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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1566

GRANNY GOOSE FOODS, INC., a corporation,
SUNSHINE BISCUITS, INC., a corporation,
and STANDARD BRANDS, INC., a corporation,
Petitioners,

v.

BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS, LOCAL 70 OF ALAMEDA COUNTY, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 112–122)[1] is reported at 472 F.2d 764. The oral opinion of the District Court and the adjudication in criminal contempt (R. 96–102) are unreported.

[1] In conformity with the brief for petitioners, references to the Appendix are designated "R".

JURISDICTION

The judgment of the Court of Appeals was issued on January 18, 1973 (R. 117). A petition for rehearing was timely filed and denied on February 22, 1973 (R. 123). The petition for a writ of certiorari, filed on May 22, 1973, was granted on October 9, 1973. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, upon removal of a proceeding from a state court to a federal district court, a temporary restraining order which had been issued by the state court without hearing, and which by state law had a maximum duration of twenty days, was by operation of 28 U.S.C. § 1450 automatically converted on removal from an order of twenty days' duration into an order of indefinite duration, with the claimed result that the federal district court's denial within twenty days of the issuance of the order of a motion to dissolve it continued the order in effect indefinitely and supported an adjudication in criminal contempt for an asserted violation of it occurring more than six months after the issuance of the order.

STATUTES INVOLVED

As part of the procedure for removal of an action from a state court to a federal district court, 28 U.S.C. § 1450 provides that:

> All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court.

Pertinent provisions of Rules 52(a), 65(a) and (b), and 81(c) of the Federal Rules of Civil Procedure;

of Sections 4 and 7 of the Norris-LaGuardia Act (47 Stat. 70, 29 U.S.C. § 101); and of Section 527 of the California Code of Civil Procedure are reprinted in the appendix to this brief (*infra*, pp. 1a-6a).

STATEMENT

A. The Proceeding before the California Superior Court

On May 15, 1970, petitioners Granny Goose Foods, Inc. and Sunshine Biscuits, Inc. filed a complaint in the Superior Court of the State of California, County of Alameda, alleging that respondent, hereafter called the Union, and various of its officers and agents were engaging in strike activity in breach of a collective bargaining agreement to which petitioners and the Union were allegedly parties (R. 6–15).[2] The alleged breach, according to the complaint, arose out of the refusal of the Union to accept and comply with "changes and revisions" in a master and local supplemental agreement which had been negotiated by petitioners' representatives and a so-called "National Freight Industry Negotiating Committee of the International Brotherhood of Teamsters" to succeed earlier agreements which had expired on March 31, 1970, some six weeks prior to the filing of the complaint (R. 10).

Upon the filing of the complaint, a temporary restraining order was issued by the Superior Court without hearing which in effect enjoined all existing strike activity (R. 15–17). In the same document the defendants in the state action were ordered to show cause on May 26, 1970, why a preliminary injunction should not

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[2] The appendix at pages 6-15 sets forth the First Amended Complaint which was filed on May 18, 1970. The original complaint is not reprinted in the appendix, but its substantive allegations are identical with those in the First Amended Complaint.

be issued in the same terms as the temporary restraining order (*ibid.*). Three days later, on May 18, 1970, a "First Amended Complaint" was filed in the Superior Court which differed from the original complaint only in that it added petitioner Standard Brands, Inc. as a party plaintiff, and also added an additional individual defendant (R. 6–15, 27). Upon the filing of the First Amended Complaint the Superior Court issued *ex parte* and without hearing a "Modified Temporary Restraining Order and Order to Show Cause," the substantive provisions of which are identical with those in the original restraining order (R. 18–20). The return date for the modified order was May 26, 1970, the same as that provided in the original order (R. 18).

On May 19, 1970, prior to service upon counsel of the Modified Temporary Restraining Order of May 18, the Union and the individual defendants in the state action removed the state court proceeding to the United States District Court for the Northern District of California on the ground that the action arose under 29 U.S.C. § 185 (Section 301 of the Labor Management Relations Act, 1947) (R. 21–26).[3] On May 20, 1970, following service of the Superior Court order on May 19, the Union and other named defendants filed in the District Court an "Amended Petition for Removal of Civil Action," attaching a copy of the First Amended Complaint, so as to ensure the effective removal of the entire proceeding from the Superior Court (R. 26–28). Following removal to the District Court there have been no further proceedings in the Superior Court which are relevant to the case before this Court.

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[3] Page 21 of the Appendix shows May 10, 1970 as the filing date of the Petition for Removal. This is a typographical error. It should read "May 19, 1970".

B. The Related Proceeding before the National Labor Relations Board

The dispute underlying the Superior Court action was also taken by petitioners to the National Labor Relations Board. In the proceeding before the Board the positions of the parties respecting the alleged breach of contract were fully developed. A brief examination of that case, which eventuated in a Board decision and order, is relevant to the legal issues discussed in the Argument. *Teamsters Local 70,* 195 NLRB No. 102 (1972), reprinted *infra,* pp. 21a-51a.

The unfair labor practice charge before the Board was filed by petitioners on April 21, 1970, and alleged that the Union was in violation of Sections 8(b)(3) and 8(b)(1)(B) of the National Labor Relations Act by refusing to abide by the new agreement which, as alleged in the complaint in this case, had been negotiated by representatives of petitioners and a national committee of the International Brotherhood of Teamsters. The position of the Union in the case before the Board was that it had taken appropriate steps to withdraw from the national multi-employer, multi-union bargaining unit in which the contract negotiations had been conducted, and that it was therefore not a party to the new agreement. The Union also argued that petitioners and the Union had a history of separate contract negotiations and accordingly were not parties to the national negotiations which resulted in the contract to which petitioners sought to hold the Union.

Following hearing, the Board on February 17, 1972, sustaining the decision of its Administrative Law Judge, rejected the Union's position, and held that the Union was bound by the new national agreement. The strike activity alleged in the complaint in the Superior Court in the instant proceeding was found by the

Board to constitute a violation of Sections 8(b)(3) and 8(b)(1)(B) of the Act in that it "was for the purpose of forcing or requiring the Charging Parties [petitioners here] to bargain on an individual basis" (*infra*, pp. 45a-46a).

C. Proceedings in the District Court Immediately Following Removal

On May 19, 1970, simultaneously with the filing of the Petition for Removal, the Union and the other named defendants filed a motion to dissolve the temporary restraining order issued by the Superior Court (R. 31). The motion was filed on the single ground that the District Court lacked jurisdiction to maintain the order in effect under this Court's decisions in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962), and *Avco Corporation* v. *Aero Lodge No. 735*, 390 U.S. 557 (1968) (R. 33). An order shortening time was issued, and the motion was noticed for May 22, 1970 (R. 35). Petitioners also filed a motion to remand the case to the Superior Court, and noticed it for the same day, May 22, 1970 (R. 38–39, 55).

The motions to remand and to dissolve were heard together by the District Court on May 27, 1970, the delay having been occasioned by the transfer of the case from the judge to whom it was originally assigned to a different judge (R. 37). The motion to remand was denied from the bench at the conclusion of the hearing (see R. 56, 98). The motion to dissolve was submitted for consideration and determination. The motion was thereafter denied on June 4, 1970, in a short written order, which reads in relevant part as follows (R. 56):

> The only issue now before the court is whether or not the District Court is mandated to dissolve the

State Court temporary restraining order. The Supreme Court decision in the recent case of *The Boys Markets, Inc.* v. *Retail Clerk's Union, Local 770,* —— U.S. —— (June 1, 1970), is dispositive of the issue. Accordingly, It Is Ordered that the motion to dissolve the State Court temporary restraining order is Denied.

The record shows no further activity in this proceeding in the District Court until the institution of the contempt proceeding which gave rise to the case before the Court, and which we describe next.

D. The Contempt Proceeding in the District Court

On December 1, 1970, petitioners filed a "Motion for Contempt Judgment" against the Union alleging that it "has failed and refused to comply with the provisions of the Modified Temporary Restraining Order" issued by the Superior Court on May 18, 1970, by instituting strike and picketing activities against petitioners on November 30, 1970 (R. 56–61, 68).[4] The motion requested that the Union be held "in civil and criminal contempt of this Court for having violated the terms of [the] Modified Temporary Restraining Order" (R. 60).

Affidavits attached to the motion allege the following events which precipitated the strike and picketing activity: On November 9, 1970, the Union sent petitioners telegrams requesting meetings for the purpose

[4] Although the record does not contain any express evidence with respect to the period between June 4, 1970, when the motion to dissolve was denied, and November 1970, when the alleged contempt occurred, the affidavits filed in support of the contempt motion plainly imply, as does the motion itself, that there was no strike or picketing activity during this interval (see R. 61–68, 70, 73, 75, 76, 82, 83).

of negotiating a collective bargaining agreement (R. 61–62). Petitioners' attorney answered the Union by letter dated November 11, 1970, stating that a contract was presently in effect, and that petitioners declined on that ground to negotiate (R. 64–65). In a letter dated November 13, 1970, the Union's attorney informed petitioners' attorney that in the Union's view there was no contract in effect, and that there was also no order in effect which "forbids Local 70 from bargaining with the employer . . ." (R. 67). The letter further states that it was the Union's position that the restraining order issued on May 18, 1970 by the Superior Court "has long since become ineffective by virtue of the statutory limitation on its duration, and there has been no application for a preliminary injunction" (*ibid.*). The affidavits in support of the contempt motion further allege that picketing and strike activity by the Union was in fact begun on November 30, 1970, and was in effect on December 1, 1970 when the motion was filed (R. 71, 73, 76, 79, 83, 86).

At the time of the filing of the contempt motion, the District Court issued an Order Shortening Time, and scheduled a hearing for 10:30 a.m. on December 2, 1970 (R. 91). The hearing began approximately one-half hour late on December 2, 1970, the delay resulting from the fact that counsel for the Union was required to appear in a different court in a nearby city earlier that morning in another case (Tr. 3–8, *infra*, pp. 8a-11a).[5] At the outset of the hearing, the

[5] "Tr." refers to those parts of the transcript of the contempt proceedings on December 2, 1970, which have not been printed in the Joint Appendix before this Court. Parts of the transcript not reprinted in the Joint Appendix are reproduced as an appendix to this brief, *infra*, pp. 7a-20a.

Union moved for severance of the criminal and civil contempt cases, and severance was granted from the bench (Tr. 9-10, *infra,* pp. 12a-13a). The District Court directed that the criminal contempt case proceed forthwith (Tr. 11, *infra,* p. 13a). The Union then moved to quash the order to show cause on the ground that the temporary restraining order which was alleged as the basis for the contempt action had expired long before the acts occurred which were claimed to violate it (Tr. 12, 15, *infra,* pp. 14a, 16a). The motion was denied (Tr. 12-15, *infra,* pp. 14a-16a).

At this point in the proceeding counsel for the Union was given a short time to read through the moving papers and affidavits in the contempt proceeding, which he had not before then had an opportunity to examine (Tr. 11-12, 15-16, *infra,* pp. 14a, 16a-17a). Immediately thereafter petitioners presented evidence that the Union had instituted picketing on November 30, 1970, in support of its request for bargaining and a contract, and that a work stoppage was then in effect (Tr. 16-78). At the conclusion of petitioners' case the Union moved for a continuance for the purpose of preparing a defense (Tr. 80-82, *infra,* pp. 19a-20a). The motion was denied (Tr. 82, *infra,* p. 20a), the District Court stating that "the case is submitted and I'm going to make a ruling now" (R. 96).

The Court summarized from the bench the proceedings which had occurred in the Superior and District Courts, and stated its conclusion that under 28 U.S.C. § 1450 the modified temporary restraining order of May 18, 1970 was still in full force and effect (R. 96–99). The District Court ruled that the picketing and strike activity which began on November 30, 1970 was "in open and flagrant defiance of the order of the

Court" (R. 101). The Court thereupon imposed a fine upon the Union in the sum of $200,000 with the following conditions (R. 101–102):

> $150,000 of that fine is conditional on the . . . [Union's] failure to purge itself within 24 hours of the date and hour of the signing of the Court's order; $100,000 of said fine is conditioned upon the . . . [Union's] failure to purge itself within 48 hours of the date and hour of this order; and $50,000 of said fine is conditioned upon the . . . [Union's] failure to purge itself within 72 hours of the date of the signing of the Court's order.*

The Union had earlier protested that "the temporary restraining order issued by the Superior Court . . . was issued without any kind of a hearing and without any arguments on the merits at all" (Tr. 15, *infra*, p. 16a). And it later reiterated that "The basis of this entire case is something we haven't heard very much about yet, and that's the question of whether or not there is a contract between Local 70 [the Union] and the various companies involved. There's never been any evidence presented to the Court on that matter, either to this Court or to the Superior Court where the temporary restraining order was issued." (Tr. 78, *infra*, p. 17a). But the District Court was unimpressed stating that it did "not deem that to be relevant to the contempt proceeding presently before it" (Tr. 79 *infra*, p. 18a). Informed by the Union's counsel that "we in-

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* The oral recitation of the proceeding and the judgment in the contempt case were transcribed and subsequently signed by the District Court as its Findings, Conclusions and Judgment. Following entry of the judgment, the Union complied immediately with the purgation provisions of the judgment, with the consequence that the fine which must be paid under the District Court's order is in the sum of $50,000 (see R. 107–108).

tend to appeal your decision, and . . . request a stay of your order pending appeal," the District Court responded that it would grant "a stay of the order upon the deposit of a bond of $1,000,000 to cover damages" (R. 102). The Union complied with the terms of purgation, thus fixing the punishment for contempt at $50,000, and the Court of Appeals stayed payment of this fine upon the posting of a bond in that sum (R. 104–108).

E. The Decision of The Court of Appeals

On appeal from the adjudication of criminal contempt, a divided Court of Appeals reversed the judgment on the ground that "the order [of May 18, 1970] expired by operation of law after removal of the cause to the federal court and before the alleged contumacious conduct occurred" (R. 112). The Court of Appeals pointed out that under California law the temporary restraining order would have expired no later than 20 days after its issuance, the same maximum duration which is affixed to a temporary restraining order issuable pursuant to Rule 65(b) of the Federal Rules of Civil Procedure (R. 114–115). It observed that nothing in the fact of removal, or in the policy of 28 U.S.C. § 1450 preserving state orders from subtraction because of removal, serves to enlarge the duration of a state order simply as a result of removal, explaining that (R. 116–117):

> Section 1450 does not create a special breed of temporary restraining orders that survive beyond the life span imposed by the state law from which they spring and beyond the life that the district court could have granted them had the orders initiated from the federal court. Section 1450 permits transfer to the federal court of state court restrain-

ing orders without any loss of potency during the trip. It adds nothing to the terms of state orders. The purpose of section 1450 is to prevent a break in the force of an injunction or a restraining order that could otherwise occur when jurisdiction is being shifted. Employers' construction of section 1450 would offend the policy of California and federal policy imposing strict limitations on the longevity of temporary restraining orders.

Accordingly, the Court of Appeals concluded that "The temporary restraining order could not survive beyond June 7, 1970, the last day within its maximum state life, a date months before the alleged contumacious acts transpired" (R. 117).[7]

In the view of the dissenting judge, the limitation on the duration of the state order fixed by state law was irrelevant, for as he saw it 28 U.S.C. § 1450 perpetuates a state order indefinitely, subject only to the power of the District Court to dissolve or modify it (R. 118). Alternatively, according to the dissenting judge, the denial by the District Court of the Union's motion to dissolve the temporary restraining order converted it into a preliminary injunction which would remain operative until final disposition of the case (R. 119–122).

SUMMARY OF ARGUMENT

On May 18, 1970, the Superior Court issued an *ex parte* temporary restraining order prohibiting all strike activity. Under California law the maximum

[7] This disposition made it unnecessary for the Court of Appeals to reach other grounds urged by the Union to support reversal. These other grounds included denial of a fair trial, want of a disinterested attitude on the part of the trier, and excessive and unauthorized punishment.

duration of that order was twenty days, and it would therefore expire by operation of law no later than June 7, 1970. On May 20, 1970, the proceeding was removed from the Superior Court to the federal district court. The District Court heard the Union's motion to dissolve the order on May 27, 1970, and denied it on June 4, 1970. At that point in time the order still had three additional days to run, so that the effect of the denial of the motion to dissolve was to continue the order in effect until June 7, 1970, and on that day it would expire by operation of law. Accordingly, petitioners had until June 7 to secure a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure. But they did not even apply for a preliminary injunction, much less obtain one. Failing that, the temporary restraining order expired, and nothing replaced it. There was thus no order in existence after June 7, 1970.

But, it is argued, as a consequence of the simple fact of the removal of the proceeding from the state court to the federal court, 28 U.S.C. § 1450 operated to convert the state order having a limited twenty-day duration into a federal order of unlimited duration, its term to endure without diminution unless the District Court affirmatively exercised its power to modify or dissolve it. Since the District Court refused to dissolve the order, it is said that the state order continued to run without limit. But the words of section 1450 support no such reading, and its purpose repels it.

In providing that "All . . . orders . . . in such [state] action prior to its removal shall remain in full force and effect until dissolved or modified by the district court," section 1450 mandates that the state order shall retain exactly that "full force and effect" that it had

before removal. But the full force and effect that the state order had before removal can only be ascertained by reference to the state law which gave it birth and defines its attributes. If, as in this case, the state order has a time limitation built into it by state law, the state order which comes into the federal court on removal brings its time limitation with it as an integral part of the order. Thus, in retaining the time-limited character of the order on removal, the order has the same unimpaired status subsequent to removal as it had prior to removal, and therefore "remain[s] in full force and effect" in precise conformity with the wording of section 1450. When that order expires after removal because its term has run, it has not lost any of its "full force and effect" because of removal. It has simply exhausted all the "full force and effect" that it ever had. An order by the District Court to dissolve or modify it would be necessary only if the movant's object were to *reduce* the "full force and effect" that the order had before removal. But a self-dissolving state order does not require affirmative dissolution by the federal court subsequent to removal any more than it would have required affirmative dissolution by the state court had there been no removal.

The purpose of section 1450 exactly fits this reading of its words. Its manifest object is to maintain the order in the same state of efficacy after removal that it had before removal. It is designed to prevent the act of removal from working either an automatic subtraction from or an automatic addition to the force that the state order would have had absent removal. The mere fact of removal is to have a neutral effect on the operativeness of the order. If the order is subject to a condition subsequent, the condition remains; if the order is limited to a term certain, the term remains.

A state order with an explicit term certain would not acquire an additional duration simply because of removal. The situation is identical whether the term certain is built into the order by operation of law or is expressed in so many words on the face of the order. In short, the purpose of section 1450 is to maintain the order in the same status after removal that it had before removal, neither to enlarge nor to diminish it automatically just because of removal. Accordingly, section 1450 did not operate to convert an order with a twenty-day duration into an order of unlimited duration.

This construction of section 1450 is fortified by its correspondence with other federal law. As the Court of Appeals states, "If the restraining order had been initially granted by the federal district court, it would have expired not later than June 7, 1970, under the provisions of Rule 65(b) of the Federal Rules of Civil Procedure" (R. 114–115). This is the same date on which it expired under state law. Accordingly, under both state and federal law the restraining order terminates by operation of law at the same time. There is no reason why the mere act of removal should give the restraining order greater duration that it would have had if the proceeding had remained in the state system or had been commenced in the federal system. Federal and state law are consonant as to the maximum duration of a restraining order, and nothing in the policy of removal suggests a result incompatible with both state and federal law.

Furthermore, had a federal district court initially issued the temporary restraining order, section 7 of the Norris-LaGuardia Act woud have governed its grant because it would be an "injunction in any case

involving or growing out of a labor dispute. . . ." Section 7 requires that a temporary restraining order may be issued only upon "testimony under oath," may last "no longer than five days," and its limited duration is emphasized by the peremptoriness of the command that it "shall become void at the expiration of said five days." This strong federal circumscription upon the issuance of a temporary restraining order in a labor dispute, both procedurally in its grant and time-wise in its duration, would be utterly subverted were a state restraining order of limited duration to be converted into a federal restraining order of unlimited duration simply by denial of a motion to dissolve subsequent to removal. There is no discernible policy underlying section 1450 which would support a result so destructive of a command which section 7 of the Norris-LaGuardia Act expresses. Section 7 and section 1450 are both federal imperatives, and rather than subjugation of one by the other, the two are to be accommodated to each other.

There is no merit to the alternative ground expressed by the dissenting judge to support the contempt adjudication, namely, that "the temporary restraining order continued in existence as a preliminary injunction after hearing by the district court and its denial of the motion to dissolve the restraint" (R. 122).

The District Court entitled its ruling "Order Denying Motion To Dissolve State Court Temporary Restraining Order" (R. 55). This title surely does not denote a preliminary injunction, and the circumstances attending its issuance preclude ascription of that status to it. The hearing on May 27, 1970 came on by notice of motion to dissolve the temporary restraining order (R. 31), and by notice of motion to remand (R. 38). Neither notice constitutes the notice required by Rule

65(a)(1) of the Federal Rules of Civil Procedure as a prerequisite to issuance of a preliminary injunction: "No preliminary injunction shall be issued without notice to the adverse party." Furthermore, the requirement of notice imports a hearing. " 'Notice' implies a hearing and all the cases are consistent with the principle that the defendant must be given a fair opportunity to oppose the application." 7 Moore's Federal Practice, 65–57, ¶65.05[3] (2d ed., 1973). It is indisputable in this case that there has been no hearing which could be described as "a fair opportunity to oppose" a preliminary injunction, and surely none that would meet the very specific and strict requirements that section 7 of the Norris-LaGuardia Act independently mandates. Finally, Rule 52(a) of the Federal Rules of Civil Procedure provides that "in granting or refusing interlocutory injunctions the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action," and section 7 of the Norris-LaGuardia Act separately requires that particular findings be made all of which are applicable to this action except that embraced by subpart (e). There were no findings of fact and conclusions of law made at all, much less of the kind required by section 7.

Accordingly, it would be altogether fictive to give the "Order Denying The Motion To Dissolve State Court Temporary Restraining Order" the status of a preliminary injunction. It simply continued the restraining order in effect for the additional three days of life it had before it expired by operation of law. At most, it constituted a declaration of power to issue a preliminary injunction, not the exercise of that power. There was neither notice, hearing, nor findings which could make more of it than that. Indeed, since

it is impossible to know that denial of the motion to dissolve, rather than continuing the order in effect for another three days, was to operate as a preliminary injunction, the order said to constitute a preliminary injunction would be too vague as to its import to support an adjudication in criminal contempt.

Finally, were the order denying the motion to dissolve to be given the effect of a preliminary injunction it would constitute a void order which could not support an adjudication in criminal contempt. It is plain on the face of the papers that the order is not addressed to a breach-of-contract strike over a grievance subject to obligatory and determinative arbitration by agreement (*Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235, 253-255 (1970)), and it is therefore a bald strike injunction that "No court of the United States shall have jurisdiction to issue . . ." § 4, Norris LaGuardia Act. Furthermore, there was utter failure to afford any notice and opportunity for hearing to show that power to issue the strike injunction was lacking. The combination of lack of power and fundamental want of procedural due process produces a void order which there is no duty to obey.

ARGUMENT

I. THE TEMPORARY RESTRAINING ORDER ISSUED BY THE SUPERIOR COURT HAD EXPIRED BEFORE THE UNION WAS FOUND TO HAVE VIOLATED IT.

A. Under California Law, the Order of May 18, 1970, Had a Maximum Duration of Twenty Days.

The Superior Court issued the temporary restraining order on May 18, 1970 pursuant to, and its duration was governed by, Section 527 of the California Code of Civil Procedure (*infra*. pp. 5a-6a). Section

527 forbids the issuance of a preliminary injunction without notice, and similarly prohibits the issuance of a temporary restraining order without notice "unless it shall appear from the facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard on notice." And Section 527 unequivocally fixes the duration of a temporary restraining order at a maximum period of twenty days:

> In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than 15 days or, if good cause appears to the court, 20 days from the date of such order.

As the Court of Appeals observed (R. 115, n. 1), and as the dissenting judge agreed (R. 117), it is settled California law that Section 527 automatically terminates a temporary restraining order on the specified return date of the accompanying order to show cause, or if the restraining order is continued by the court upon a showing of "good cause," upon the expiration of 20 days from the date of the order. *Sharpe* v. *Brotzman,* 145 C.A. 2d 354, 358, 359, 302 P.2d 668 (1956); *Lockwood* v. *Sheedy,* 157 C.A. 2d 844, 321 P.2d 863 (1958); see *Curtiss* v. *Bachman,* 110 Cal. 433, 439, 42 P. 910 (1895). The limitation upon the duration of the order is strictly construed. If the restraining order provides on its face for a duration in excess of that permitted by Section 527, the order is void *ab initio. Oksner* v. *Superior Court,* 229 C.A. 2d 672 (1964); *Agricultural Prorate Commission* v. *Superior Court,* 30 C.A. 2d 154, 155, 85 P.2d 898 (1938); B. E. Witkin,

California Procedure (2d ed. 1970, p. 1522). As summarized in *Kelsey* v. *Superior Court*, 40 Cal. App. 229, 236, 180 P. 662 (1919): "The provisions of Section 527 provide a complete scheme in a proper case for obtaining a writ of injunction and such scheme must be deemed the measure of the power to be exercised by trial courts in the matter of provisional injunctions."[8]

Accordingly, the Court of Appeals concluded that under California law the May 18 order "expired by operation of law" no later than June 7, 1970, twenty days after its entry (R. 114). It recognized the possibility that the order might have expired earlier on its return date of May 26, 1970, but deemed it reasonable to "assume that the Union would have moved the state court to dissolve, as it did in the federal court, and that there would possibly have been continuance of the return date within the 20-day maximum permitted by statute" (R. 114, n. 1). The assumption makes good sense. It gives maximum effect to the policy of 28 U.S.C. § 1450 of not having the simple fact of removal subtract from the efficacy that an outstanding state order might otherwise have (*infra*, pp. 22-25). It avoids the artificiality of having a return date specified in a state order, which would have been alter-

[8] Petitioners' argument that "California does not establish an inflexible automatic expiration date for temporary restraining orders" (br. p. 10, n. 6, and p. 6, n. 3) is not persuasive. The circumstance that a defendant against whom an *ex parte* order is issued may request or stipulate to a continuance of an order does not affect the restriction of law on its duration in the absence of consent. Lacking consent, and there was none in the present case, a California court cannot continue a temporary restraining order beyond the statutory period; to do so would be "to nullify the terms of the statute, which are so plain and unambiguous that no room exists for interpretation." *Smith* v. *Superior Court*, 64 Cal. App. 722, 730, 222 P. 857 (1923).

able had the proceeding remained in the state court, constitute an irrevocable and fixed terminal point once the proceeding is removed. Accordingly, indulging every consideration in favor of its maximum duration under California law, the date of June 7, 1970, was the necessary terminal point of the May 18, 1970 order.

This time frame governs the present case. Given the entry of the temporary restraining order on May 18, 1970, its maximum duration of twenty days would cause it to expire by California law no later than June 7, 1970. On June 4, 1970, following removal, the District Court denied the motion to dissolve the order. The effect of this denial was to continue the restraining order in effect for another three days, or until June 7, for on June 4 the order still had three additional days to run before its expiration by operation of law on June 7. Accordingly, petitioners had until June 7 to secure a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure. But they did not even apply for a preliminary injunction, much less obtain one. Failing that, the temporary restraining order expired, and nothing replaced it. There was thus no order in existence after June 7, 1970.

In sum, as the Court of Appeals unanimously agreed—the dissenting judge no less than the majority (R. 114, 117)—the May 18, 1970 temporary restraining order expired by operation of California law on June 7, 1970, twenty days from its entry. Its posture was precisely as if the order had in so many words stated that it terminated on June 7, 1970. Accordingly, the exact question presented is whether, as the result of the simple fact of removal, 28 U.S.C. § 1450 operated

to convert a state order of limited duration into a federal order of unlimited duration, its term to endure without diminution unless the District Court affirmatively exercised its power to modify or dissolve it. We turn to that question.

B. 28 U.S.C. §1450 Did Not Operate To Convert a State Order of Twenty-Days' Duration into a Federal Order of Unlimited Duration.

It is argued that as a consequence of the removal of the proceeding from the state court to the federal court, 28 U.S.C. § 1450 did indeed operate to convert the state order having a limited twenty-day duration into a federal order of unlimited duration, its term to endure in perpetuity unless the District Court affirmatively exercised its power to modify or dissolve it. Since the District Court refused to dissolve the order, it is said that the state order continued to run without limit. But the words of section 1450 support no such reading, and its purpose repels it.

In providing that "All . . . orders . . . in such [state] action prior to its removal shall remain in full force and effect until dissolved or modified by the district court," section 1450 mandates that the state order shall retain exactly that "full force and effect" that it had before removal. But the full force and effect that the state order had before removal can only be ascertained by reference to the state law which gave it birth and defines its attributes. If, as in this case, the state order has a time limitation built into it by state law, the state order which comes into the federal court on removal brings its time limitation with it as an integral part of the order. Thus, in retaining the time-limited character of the order on removal, the order

has the same unimpaired status subsequent to removal as it had prior to removal, and therefore "remain[s] in full force and effect" in precise conformity with the wording of section 1450. When that order expires after removal because its term has run, it has not lost any of its "full force and effect" because of removal. It has simply exhausted all the 'full force and effect" that it ever had. An order by the District Court to dissolve or modify it would be necessary only if the movant's object were to *reduce* the "full force and effect" that the order had before removal. But a self-dissolving state order does not require affirmative dissolution by the federal court subsequent to removal any more than it would have required affirmative dissolution by the state court had there been no removal.

The purpose of section 1450 exactly fits this reading of its words. Its manifest object is to maintain the order in the same state of efficacy after removal that it had before removal. It is designed to prevent the act of removal from working either an automatic subtraction from or an automatic addition to the force that the state order would have had absent removal. The mere fact of removal is to have a neutral effect on the operativeness of the order. If the order is subject to a condition subsequent, the condition remains; if the order is limited to a term certain, the term remains. A state order with an explicit term certain would not acquire an additional duration simply because of removal. The situation is identical whether the term certain is built into the order by operation of law or is expressed in so many words on the face of the order. In short, the purpose of section 1450 is to maintain the order in the same status after removal that it had before removal, neither to enlarge nor to diminish it

automatically just because of removal. Accordingly, section 1450 did not operate to convert an order with a twenty-day duration into an order of unlimited duration.

Precedent is sparse but fully supports this conclusion.[9] Thus, "if a judgment finally adjudicating rights of the parties has been rendered in the state court before removal, it has the same effect as if rendered in the Federal Court, *but it has no greater force.*" *Savell* v. *Southern Ry Co.*, 93 F.2d 377. 379 (C.A. 5, 1937) (emphasis supplied). Similarly, "[i]nterlocutory orders made in the state court clearly do not, by virtue of their removal to the United States circuit court, receive any . . . additional force and effect . . ."; they retain the "force and effect" they had but they do not acquire "any greater force and effect . . . *Bryant* v. *Thompson*, 27 Fed. 881, 882 (C.C.S.D., Iowa, 1886)."[10]

In like fashion, the command of section 1450 does not operate to cure defects in the state court action. " . . . [T]he cause is transferred to the district court as it stands in the state court"; removal does not improve its posture or enhance its immunity from challenge. *Cain* v. *Commercial Publishing Co.*, 232 U.S. 124, 133 (1914). "The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject matter, or of the parties, the federal court

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[9] The language which now appears in 28 U.S.C. § 1450 has undergone no substantial change since its appearance as Section 4 of the Act of March 3 ,1875, 18 Stat. 470.

[10] And see, *Hill* v. *U.S. Fidelity & Guaranty Co.*, 428 F.2d 112, 115 (C.A. 5, 1970); *Butner* v. *Neustadter*, 324 F.2d 783, 785 (C.A. 9, 1963); *Munsey* v. *Testworth Laboratories*, 227 F.2d 902, 903 (C.A. 6, 1955); *Kizer* v. *Sherwood*, 311 F. Supp. 809 (D.C.M.D.Pa., 1970).

acquires none. . . ." *Lambert Run Coal Co.* v. *Baltimore & Ohio Railroad*, 258 U.S. 377, 382 (1922).[11]

These are but applications of the unifying principle which underlies section 1450. Removal as such neither adds to nor detracts from the state court proceeding, including the force and effect of the orders that the state court had issued. In short, the federal court "takes the case up where the State Court left it off" (*Duncan* v. *Gegan*, 101 U.S. 810, 812 (1880)), and therefore in this case the temporary restraining order of May 18, 1970 issued by the Superior Court arrived in the District Court with the same status that it had before removal. It had a twenty-day life span as it came into the District Court. Section 1450 protected the full duration of that life span, and that fulfilled the entire purpose of section 1450; but section 1450 did not elongate that duration, and that was no part of its purpose.[12]

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[11] See also, *Minnesota* v. *United States*, 305 U.S. 382, 395 (1939); *Dry Clime Lamp Corp.* v. *Edwards*, 389 F.2d 591, 595–596 (C.A. 5, 1968); *Curtis Co.* v. *Falls, Inc.*, 305 F.2d 811, 814 (C.A. 3, 1962); *In re Chicago Rapid Transit Co.*, 192 F.2d 206, 208 (1951); *Dunn* v. *Cedar Rapids Engineering Co.*, 152 F.2d 733, 734 (C.A. 9).

[12] Petitioners vastly overstate the import of the cases they cite when they assert with staggering hyperbole that "[w]ithout exception, the courts of other Circuits have determined that only dissolution by the federal court terminates such a state court order" (br. p. 13). Cited at page 11 of their brief, *Appalachian Volunteers* v. *Clark*, 432 F.2d 530 (C.A. 6, 1970), cert. denied, 401 U.S. 939 (1971), dealt with a state order which "had no termination date" (432 F.2d at 532), and therefore is inapposite to the distinctive question of a state order containing a term certain limiting its duration. As to *Morning Telegraph* v. *Powers*, 450 F.2d 97 (C.A. 2, 1971), cert. denied, 405 U.S. 954 (1972), cited at p. 12, petitioners themselves describe the Second Circuit's statement as "dicta." It was a passing reference, not essential to the decision, the central issue being the appealability of what was said to be a temporary

C. Other Federal Law Is in Harmony with the Conclusion That 28 U.S.C. §1450 Does Not Operate To Convert a State Order of Limited Duration into a Federal Order of Unlimited Duration.

The conclusion that 28 U.S.C. § 1450 neither adds to nor subtracts from the duration that a state order had before removal is fortified by other federal law to which section 1450 should correspond unless there is a compelling reason for attributing a contradictory direction to it. On removal the "forms and modes of proceeding are governed by federal law." *Freeman* v. *Bee Machine Co.*, 319 U.S. 448, 452 (1943). See also, *Ex parte Fisk*, 113 U.S. 713, 725, 726 (1885). As Rule 81(c) of the Federal Rules of Civil Procedure provides, "These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal."

We therefore now show that the interpretation of section 1450 adopted by the Court of Appeals harmonizes, and a contrary conclusion would conflict, with both Rule 65(b) of the Federal Rules of Civil Procedure and section 7 of the Norris-LaGuardia Act. We need hardly add that a meshing interpretation of cognate laws is obviously preferable to a discordant construction.

1. Rule 65(b) of the Federal Rules of Civil Procedure

As the Court of Appeals states, "If the restraining order had been initially granted by the federal district court, it would have expired not later than June 7,

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restraining order but which was in actuality the equivalent of a preliminary injunction. See, Wright, Federal Courts, 459 (2d ed. 1970). As to the two District Court opinions cited at pages 12–13 of petitioners' brief, the statements are again conclusory and passing, each peripheral to the core issues upon which decision focused. The decision below is the only fully considered determination by any court of the question presented, and there is no precedent opposing its conclusion to which any persuasive appeal can be made.

1970, under the provisions of Rule 65(b) of the Federal Rules of Civil Procedure" (R. 114–115). That rule provides in relevant part that:

> Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period.

Accordingly, the maximum duration of a nonconsensual temporary restraining order under Rule 65(b) is twenty days, the same maximum duration which California law fixes. And, like California law, under Rule 65(b) the order expires by operation of law upon the elapse of the specified time limitation, and thereupon becomes "ineffective as far as the parties therein restrained . . . [are] concerned." *Southard & Co.* v. *Salinger,* 117 F.2d 194, 196 (C.A. 7, 1941).[12] The operation of this limitation is not affected by the circumstance that there may have been informal notice to the party restrained where, as here, issuance of the order was without opportunity for a hearing. See *Austin* v. *Altman,* 332 F.2d 273, 275 (C.A. 2, 1964). As one District Court stated, where counsel for the defendant was given two-days' notice of the application

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[12] See also, *Weintraub* v. *Hanrahan,* 435 F.2d 461, 463 (C.A. 7, 1970); *Dilworth* v. *Riner,* 343 F.2d 226, 229 (C.A. 5, 1965); *Benitez* v. *Anciani,* 127 F.2d 121, 125 (C.A. 1, 1942), cert. denied 317 U.S. 597 (1942); *In re California Lumber Corp.,* 24 FRD 190 (D.C.S.D. Calif., 1969).

and appeared in court at the time of issuance, "under these circumstances it would be stretching the requirements of due process to convert a temporary restraining order into a hearing for preliminary injunction." *Bailey* v. *Transportation-Communications Employees Union*, 45 FRD 444, 445 (D.C. N.D. Miss., 1968). See also, *Connell* v. *Dulien Steel Products*, 240 F.2d 414, 417 (C.A. 5, 1957), cert. denied, 356 U.S. 968 (1958); Cf., *Benitez* v. *Anciani*, 127 F.2d 121, 125 (C.A. 1, 1942), cert. denied, 317 U.S. 597 (1942).[14]

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[14] The rule is the same under California law. *Johnson* v. *The West Mining Co.*, 22 Cal. 479 (1863). For a description of the practice in California courts of inviting counsel for the party against whom a restraining order is sought to attend an informal conference in the chambers of the issuing judge at the time application is made, see *Procedure Before Trial* (Continuing Education of the Bar, Univ. of Calif. Press, 1967), p. 625. As there noted, "Participation in such an informal conference should not constitute a waiver of the notice required under Section 529 [of the California Code of Civil Procedure] before a preliminary injunction may issue."

The authorities cited in the text and accompanying note require rejection of petitioners' suggestion (br. pp. 17–18) that federal law would treat the original Superior Court order of May 15, 1970, as a preliminary injunction on the ground that counsel for the Union appeared at the time of its issuance in response to telephonic notice. Moreover, the order which is in issue in the present case is the modified temporary restraining order of May 18, 1970, which was issued in the absence of counsel for the Union, although again telephonic notice was given that application would be made. The cases relied on by petitioners (br. 18) do not support their argument. They deal with the question of whether a particular order can be treated as a preliminary injunction rather than a temporary restraining order for purposes of determining appealability. See Wright, Federal Courts, 459 (2d ed. 1970). Even if it were to be assumed, contrary to every uncontested fact of record, that the Superior Court order of May 18, 1970, constitutes a preliminary injunction, it plainly could not pass muster under Rule 65 or any other federal test for the issuance of such an order. *Sims* v. *Greene*, 160 F.2d 512, 516 (C.A. 3, 1947); *National Mediation Board* v. *Air Line Pilots Association*, 323 F.2d 305 (C.A.D.C., 1963). See also the discussion *infra*, pp. 34-42.

Thus, the twenty-day maximum duration of a temporary restraining order is identical under Rule 65(b) of the Federal Rules of Civil Procedure and section 527 of the California Code of Civil Procedure. Federal and state law converge. Under both the order in this case terminated by operation of law at the same time on June 7, 1970. There is no reason why the mere act of removal should give the restraining order greater duration than it would have had if the proceeding had remained in the state system or if it had been originally commenced in the federal system. Federal and state law are consonant as to the maximum duration of a restraining order, and nothing in the policy of removal suggests a result incompatible with both state and federal law.[15]

2. Section 7 of the Norris-LaGuardia Act.

Had the District Court in this case initially issued the temporary restraining order, section 7 of the Norris-LaGuardia Act would have governed its grant because it would be an "injunction in any case involving or growing out of a labor dispute. . . ." Section 7 provides in relevant part that.

> . . . [I]f a complainant shall . . . allege that, unless a temporary restraining order shall be issued with-

[15] Petitioners concede (br. pp. 15–17), as they must, that their interpretation of section 1450 results in a conflict with Rule 65(b). They seek to justify according preeminence to section 1450 by asserting that Rule 65(b) must yield by reason of 28 U.S.C. § 2071 which provides that "Such rules shall be consistent with Acts of Congress . . ." (br. p. 16). However, since section 1450 and Rule 65(b) are congruent, petitioners' argument is beside the point. It may be noted, moreover, that their argument is also mistaken. 28 U.S.C. § 2071 authorizes "The Supreme Court and all courts established by Act of Congress . . . [to] prescribe rules for the conduct of their business." It has reference only to rules of practice before the courts. Authority to establish the Federal Rules of Civil Procedure is contained in 28 U.S.C. § 2072, which does not contain the language upon which petitioners rely.

> out notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days.

Thus, section 7 requires that a temporary restraining order may be issued only upon "testimony under oath," may last "no longer than five days," and its limited duration is emphasized by the peremptoriness of the command that it "shall become void at the expiration of said five days." This strong federal circumscription upon the issuance of a temporary restraining order in a labor dispute, both procedurally in its grant and time-wise in its duration, would be utterly subverted were a state restraining order of limited duration to be converted into a federal restraining order of unlimited duration simply by denial of a motion to dissolve subsequent to removal. There is no discernible policy underlying section 1450 which would support a result so destructive of a command which section 7 of the Norris-LaGuardia Act expresses. Section 7 and section 1450 are both federal imperatives, and rather than subjugation of one by the other, the two are to be accomodated to each other.

It may be argued that section 7 of the Norris-LaGuardia Act is inapplicable in this case because the action arises under section 301 of the Labor Management Relations Act, 1947, and in furtherance of this argument the authority of *Boys Markets* v. *Retail Clerks Union,* 398 U.S. 235 (1970), may be invoked to support the claim that an LMRA § 301 action is

exempt from the control of the Norris-LaGuardia Act. But the argument would be insupportable on any premise. First of all, *Boys Markets* is addressed only to a breach-of-contract strike over a grievance subject to obligatory and determinative arbitration by agreement (398 U.S. at 253–254), and the controversy in this case is wholly outside this scope. The dispute related instead to whether the Union was bound to any agreement at all; petitioners claimed that the Union and they were parties to a national agreement emerging from negotiations in a multi-union multi-employer bargaining unit; the Union claimed that it had withdrawn from that unit and was entitled to bargain independently with petitioners in accordance with an historical practice of separate negotiations among the parties; there was no agreement to resolve this controversy by arbitration, the dispute being decided ultimately by the National Labor Relations Board (*supra*, pp. 3, 5-6, 7-8, 10, *infra*, pp. 21a-51a). In this situation *Boys Markets* is wholly inapplicable (*infra*, pp. 44-47), and section 7 of the Norris-LaGuardia Act retains its full undiminished force.

But even if this were a dispute within the scope of *Boys Markets*, the limitations imposed by section 7 upon the grant of a temporary restraining order would still obtain. *Boys Markets* lifts the restrictions of the Norris-LaGuardia Act only to the extent necessary to give effect to the exercise of equity jurisdiction to enjoin a breach-of-contract strike over a grievance subject to obligatory and determinative arbitration by agreement. The limitations of section 7 of the Norris-LaGuardia Act on the grant of a temporary restraining order in a labor dispute do not affect the efficacy of the grant of injunctive relief to enjoin a breach-

of-contract strike over an arbitrable dispute and therefore continue in full force. *Emery Air Freight Corp.* v. *Local Union No. 295, Teamsters,* 449 F.2d 586, 588 (C.A. 2, 1971), cert. denied, 405 U.S. 1066 (1973). So long as there is "no conflict" between an otherwise applicable provision of the Norris-LaGuardia Act "and the policy in favor of arbitration" succored by LMRA § 301, the provision of the Norris-LaGuardia Act is to be observed. *New York Telephone Co.* v. *Communications Workers of America,* 445 F.2d 39, 49–50 (C.A. 2, 1971). This is true of actions to enforce the Railway Labor Act (*ibid.; Brotherhood of Railroad Trainmen* v. *Akron & Barbetron Belt Co.,* 385 F.2d 581, 613–614 (C.A.D.C., 1967), cert. denied, 390 U.S. 923 (1968); same case, 420 F.2d 72, 73-74 (C.A.D.C., 1968), cert. denied, 397 U.S. 1024 (1970)), and the same is equally true of actions arising under LMRA § 301. Enforcement of the arbitration promise through prohibition of a strike in breach of it is entirely consistent with full preservation of the procedural safeguards erected by section 7 of the Norris-LaGuardia Act against rash and unreflective issuance of temporary restraining orders. Indeed, the remedy which *Boys Markets* fashioned can be best served by procedural care in its exercise. Accordingly, section 7 continues to exert its full command, and an interpretation of section 1450 which preserves section 7 from unnecessary dilution is obviously to be preferred to one which undercuts it.[16]

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[16] See also, in addition to previous citations in the text, *United States Steel Corp.* v. *United Mine Workers,* 456 F.2d 483 (C.A. 3, 1972); *Food Fair Stores* v. *Food Drivers Local Union No. 400,* 84 LRRM 2509, 2512 (D.C.E.D. Pa., 1973); *L.A. Concrete Pumping* v. *Majich,* 84 LRRM 2653 (D.C.C.D. Cal., 1973), stay pending appeal denied, 84 LRRM 2655 (C.A. 9, 1973). While we stated in

D. The Upshot.

To convert a state order of limited duration into a federal order of unlimited duration simply as an automatic consequence of removal of the action from a state court to a federal court is without any support in reason. It does not give to the state order the "full force and effect" in the federal court after removal that it had in the state court before removal, but instead enlarges the force it had. It therefore does not comply with but contradicts the command of 28 U.S.C. § 1450. And this distortion subverts the requirements of Rule 65(b) of the Federal Rules of Civil Procedure in every case and the requirements of section 7 of the Norris-LaGuardia Act in every labor case. When all three federal commands can operate with full compatibility there is surely no reason to work a result which brings them into collision.

II. DENIAL OF THE UNION'S MOTION TO DISSOLVE DID NOT TRANSFORM THE TEMPORARY RESTRAINING ORDER INTO A PRELIMINARY INJUNCTION; AND IF ANY SUCH TRANSFORMATION HAD BEEN EFFECTUATED IT WOULD RESULT IN A VOID ORDER WHICH COULD NOT SUPPORT AN ADJUDICATION IN CRIMINAL CONTEMPT.

As an alternative ground upon which to support the adjudication in criminal contempt, the dissenting judge took the view that "the temporary restraining order continued in existence as a preliminary injunction after hearing by the district court and its denial of

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our brief below that "[i]n view of . . . *Boys Markets* . . . the Norris-LaGuardia Act is not applicable in Section 301 suits" (p. 14, n. 7), further reflection and research has shown the error of that position, and in reversing ourselves we can at least take comfort from a venerable admonition against commitment to a foolish consistency.

the motion to dissolve the restraint" (R. 122). But the majority rejected that position, explaining that (R. 117):

> If Employers wanted a preliminary injunction, they easily could have sought one. They did not do so. The Union's unsuccessful effort to dissolve the order before it died a natural death did not convert the temporary restraining order into a preliminary injunction or estop it from relying on the death certificate.

The majority's view is clearly correct. The District Court entitled its ruling "Order Denying Motion To Dissolve State Court Temporary Restraining Order" (R. 55). This title surely does not denote a preliminary injunction, and the circumstances attending its issuance preclude ascription of that status to it. Furthermore, were the order denying the motion to dissolve to be given the effect of a preliminary injunction it would constitute a void order which could not support an adjudication in criminal contempt.

We show, first, that denial of the motion to dissolve did not convert the temporary restraining order into a preliminary injunction, and, second, that any such conversion would have produced a void order to which no duty of obedience would be owed.

A. Denial of the Motion To Dissolve Satisfied None of the Requirements for Issuance of a Preliminary Injunction and Therefore Cannot Be Construed as One.

1. As a prerequisite to issuance of a preliminary injunction, Rule 65(a)(1) of the Federal Rules of Civil Procedure requires that: "No preliminary injunction shall be issued without notice to the adverse party." The hearing on May 27, 1970, followed by

denial of the motion to dissolve on June 4, 1970, was not held pursuant to any notice that a preliminary injunction was to be sought. The hearing came on by the Union's notice of motion to dissolve the temporary restraining order (R. 31), and by petitioners' notice of motion to remand the proceeding to the state court (R. 38). Petitioners' remand motion was based on the ground that "defendants have waived their right to removal by submitting to the jurisdiction of the state court" (R. 39). The Union's dissolution motion was based on the single "ground that the [District] Court is without jurisdiction to maintain the temporary restraining order in effect under Section 4 of the Norris LaGuardia Act 29 U.S.C. 104" (R. 31). In a one sentence statement of position in support of its motion, the Union cited this Court's decisions in *Avco Corporation* v. *Aero Lodge No. 735*, 390 U.S. 557, and *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (R. 33). Accordingly, neither the Union's nor petitioners' notices and motions constituted apprisal that a preliminary injunction was to be sought.

2. Nothing transpired at the hearing on May 27, 1970, which could enlarge the notices into an application for a preliminary injunction, and the ensuing ruling denying the dissolution motion did not constitute apprisal that a preliminary injunction that had not been sought had nonetheless been granted. The remand motion was denied from the bench at the conclusion of the hearing (R. 56, 98. Tr. 13, *infra*, p. 15a). As to the dissolution motion, the District Court recognized at the contempt hearing that "the only objection" at the hearing on that motion was that the court lacked jurisdiction "on the theory that the *Sinclair* decision was applicable" (R. 99, Tr. 12. *infra*, p. 14a).

The objection on that ground was taken under advisement at the conclusion of the hearing. Subsequent to the hearing, as the Court of Appeals stated, "[w]hile the motion to dissolve was pending, the Supreme Court [on June 1, 1970] decided *Boys Markets, Inc.* v. *Retail Clerks Union* (1970), 398 U.S. 235, a decision that destroyed the foundations of *Sinclair* . . . . on which the Union's dissolution motion had been based" (R. 113–114). Accordingly, on June 4, 1970, in reliance on the intervening decision in *Boys Markets,* the District Court "Ordered that the motion to dissolve the State Court temporary restraining order is denied" (R. 98, Tr. 12–13, *infra,* pp. 14a–15a). Hence, the maximum import of the denial order was to continue the temporary restraining order in effect for its unexpired term; it could not constitute the issuance of a preliminary injunction, a matter which had been neither noticed nor heard.

3. This Court's decision in *Boys Markets* especially brought to the fore the reason why Rule 65(a)(1) mandates notice of application for a preliminary injunction. " 'Notice' implies a hearing and all the cases are consistent with the principle that the defendant must be given a fair opportunity to oppose the application. Conversely, the plaintiff is entitled to a hearing on his application for a temporary injunction." 7 Moore's Federal Practice, 65–57, ¶ 65.05[3] (2d ed., 1973).[17] A hearing is essential for the movant "must show a substantial likelihood of success on the merits, and that

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[17] See also, *Sims* v. *Greene,* 160 F.2d 512 (C.A. 3, 1947); *Hawkins* v. *Board of Control of Florida,* 253 F.2d 752 (C.A. 5, 1968); *Marshall Durbin Farms Inc.* v. *National Farmers Organization,* 446 F.2d 353, 356 (C.A. 5, 1971); Cf., *United States* v. *Crusco,* 464 F.2d 1060, 1063 (C.A. 3, 1972).

irreparable harm would flow from denial of an injunction. In addition, the trial judge must consider the inconvenience that an injunction would cause the opposing party, and must weight the public interest as well." *A Quaker Action Group* v. *Hickel,* 421 F.2d 1111, 1116 (C.A.D.C., 1969).[18] The "burden of establishing the right to preliminary injunctive relief" is the movant's. Moore, *op cit.* 65–61, ¶ 65.04(3); *Pauls* v. *Secretary of Air Force,* 457 F.2d 294, 298 (C.A. 1, 1971). A preliminary injunction does not issue unless and until the court, upon careful consideration of the many factors that are relevant to the exercise of equitable power, concludes that the movant has shown a "reliable factual basis therefor" and concomitant legal and equitable warrant. Moore, *op. cit,* 65-65, ¶65.04 (4); *Pauls* v. *Secretary of Air Force,* 457 F.2d 294, 298 (C.A. 1, 1971).

This Court's decision in *Boys Markets* does not dispense with, but emphasizes the need to consider, "whether issuance of an injunction would be warranted under ordinary principles of equity . . . " (398 U.S. at 254). But it does more. It allows the issuance of a strike injunction only to prohibit a breach-of-contract strike over a grievance subject to obligatory and determinative arbitration by agreement. *Id.* at 253–254. And "the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike" *Id.* at 254.

In this case there has never been any hearing inquiring into the justifiability of the issuance of a *Boys*

[18] See also, *Dorfmann* v. *Boozer,* 414 F.2d 1168, 1173 (C.A.D.C., 1969); Wright & Miller, *Federal Practice and Procedure: Civil,* Vol. 11, § 2948, pp. 427-466 (West 1973).

Markets injunction. Indeed, the crux of the controversy between the parties was whether there was any agreement which bound the Union at all (*supra,* pp. 3, 5-6, 7-8, 10, 31, *infra,* pp. 21a-51a), and there was no hearing at any stage on this crucial question (*supra.* p. 10). The slightest relevant factual inquiry would have disclosed that the parties were locked in a contract-no contract controversy, and the slightest relevant legal inquiry would have demonstrated that the issuance of a strike injunction in such a dispute was outside the compass of *Boys Markets* and therefore beyond the power of the District Court (*infra,* pp. 44-47).

Accordingly, there was neither notice nor opportunity for hearing which notice implies, each of which is the indispensable precondition to the issuance of a preliminary injunction. And the want of a hearing is especially egregious in view of the specific requirement of section 7 of the Norris-La Guardia Act. That section unequivocally provides that:

> No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered . . . .

An evidentiary hearing is fully consistent with the objective of a *Boys Markets* remedy, and therefore the command of section 7 requiring it [19] remains in full force (*supra,* pp. 31-32).

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[19] See, *Milk Wagon Drivers Union Local 753* v. *Lake Valley Farm Products,* 311 U.S. 91, 100 (1940).

4. Rule 52(a) of the Federal Rules of Civil Procedure requires that "in granting or refusing interlocutory injunctions the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action." The requirement is without qualification and applies with respect to all preliminary injunctions.[20] In this case no findings of fact and conclusions of law were made at all. None were prepared for the District Court; none were requested by the District Court; none were made by the District Court. The egregiousness of this default is again emphasized by the cross-light which section 7 of the Norris-LaGuardia Act throws. That section requires that particular findings be made all of which, were any strike injunction allowable at all, would be applicable to this action except that embraced by subpart (e) (*infra,* pp. 3a–4a). But there were no findings of fact and conclusions of law of any kind despite the command of both Rule 52(a) and section 7.

5. Plainly, then, the order denying the motion to dissolve cannot be treated as a preliminary injunction, for none of the prerequisites essential to the grant of a preliminary injunction had been satisfied. The order can acquire the status of a preliminary injunction only by the invention of some new legal doctrine. And this indeed seems to be petitioners' claim, for they appear to assert that in every instance denial of a motion to dissolve a temporary restraining order constitutes *ipso facto* the grant of a preliminary injunction so long as

[20] *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940); *Consolidated Coal Co.* v. *Disabled Miners of Southern West Virginia*, 442 F.2d 1261, 1270 (C.A. 4, 1971); *National Mediation Board* v. *Air Line Pilots Association*, 323 F.2d 305 (C.A.D.C., 1963); *Carpenters District Council* v. *Cicci*, 261 F.2d 5, 7 (C.A. 6, 1958).

the ruling was preceded by hearing on notice (br. pp. 24–27). But petitioners plainly admix a number of discrete considerations none of which is apposite in the present case.

The question of characterization of an order often arises in determining its appealability, a preliminary injunction being appealable while a temporary restraining order ordinarily is not. *E.g., Weintraub* v. *Hanrahan,* 435 F.2d 461, 462–463 (C.A. 7, 1970). The cases upon which petitioners rely are of this kind.

Thus, sometimes a motion to dissolve a restraining order may be based on grounds identical to those which would support denial of a preliminary injunction, and the ensuing proceeding may therefore in actuality become the functional equivalent of a hearing on a preliminary injunction. As suggested in Wright & Miller, *Federal Practice and Procedure: Civil,* Vol. 11, § 2954, p. 523 (West, 1973):

> In some situations the parties may find that they are prepared to offer sufficient evidence at a hearing to modify or dissolve the temporary restraining order so that in effect, the proceeding becomes a hearing on a preliminary injunction. If this occurs, the court should proceed with the hearing as if it were under Rule 65(a).

A variant is illustrated by *Morning Telegraph* v. *Powers,* 450 F.2d 97 (C.A. 2, 1972), cert denied, 405 U.S. 954 (1972). There the court noted that "the practical effect of the refusal to dissolve the temporary restraining order was the equivalent of a grant of preliminary injunctive relief," for there had been "not once but three different times" upon which the defend-

ant "was heard on the propriety of preliminary relief." 450 F.2d at 99. Situations of this kind exemplify the rule that "the label put on the order by the trial court is not decisive" in determining whether it may be treated as a preliminary injunction for purposes of appealability. Wright & Miller, *Federal Practice and Procedure: Civil,* Vol. 11, § 2962. p. 619 (West 1973); see also, *Stricklin* v. *Regents of University of Wisconsin,* 420 F.2d 1257, 1259 (C.A. 7, 1970).

Ordinarily, however, a ruling on a motion to dissolve a temporary restraining order is no more than that, and even for purposes of appealability it is not characterized as a preliminary injunction without special reason. See, *Leslie* v. *Penn Railroad Co.,* 410 F.2d 750 (C.A. 6, 1969). The solution in a particular case turns on its own circumstances viewed in the light of considerations appropriate to allowing or denying interlocutory appeals.[21] Furthermore, even where a restraining order is given the status of a preliminary injunction for purposes of allowing an appeal, "there is no reason why the order then must become a preliminary injunction for all purposes. Indeed, . . . in some instances it may be improper to do so because the requirements for obtaining a preliminary injunction will not be satisfied." Wright & Miller, *Federal Practice and Procedure:* Civil, Vol. 11, § 2953, p. 520 (West, 1973).

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[21] See, *e.g., Lowe* v. *Warden & Commissioner of Holman Prison Unit,* 450 F.2d 9, 11–12 (C.A. 5, 1971); *Smith* v. *Jackson State College,* 441 F.2d 278, 279 (C.A. 5, 1971); *Belknap* v. *Leary,* 427 F.2d 496, 498 (C.A. 2, 1970); *Wirtz* v. *Powell Knitting Mills Co., Inc.,* 360 F.2d 730 (C.A. 2, 1966); *Woods* v. *Wright,* 334 F.2d 369, 373 (C.A. 5, 1964); *Ross* v. *Evans,* 323 F.2d 160 (C.A. 5, 1963); *Connell* v. *Dulien Steel Products,* 240 F.2d 414 (C.A. 5, 1957); *Sims* v. *Greene,* 160 F.2d 512 (C.A. 3, 1947).

In this case there is of course no question of appealability. Accordingly, the learning pertaining to characterization of orders for that purpose is quite beside the point. Therefore, petitioners can muster no genuine support for their extraordinary claim that denial of a motion to dissolve a temporary restraining order heard after notice serves without more to convert the order into a preliminary injunction.

6. The upshot is plain. It would be altogether fictive to give the "Order Denying The Motion To Dissolve State Court Temporary Restraining Order" the status of a preliminary injunction. It simply continued the restraining order in effect for the additional three days of life it had before it expired by operation of law. At most, it constituted a declaration of power to issue a preliminary injunction, not the exercise of that power. There was neither notice, hearings, nor findings which could make more of it than that.

7. One final consideration merits mention. The District Court's ruling states no more than that "It Is Ordered that the motion to dissolve the State Court temporary restraining order is Denied" (R. 56). The import of that order is at best completely uncertain. It is not possible to know from its terms that it is expected to operate as a preliminary injunction to endure until final disposition of the cause rather than as a simple preservation of the life of the order for the three additional days it still had to run when its dissolution was denied. It is therefore clearly too vague to support an adjudication in criminal contempt, for no one can know with any sureness for what period the command it implicitly expresses is to last. It thus falls within the condemnation of the principle this Court enunciated in *International Longshoremen's*

Association v. *Philadelphia Marine Trades Association*, 389 U.S. 64, 76 (1976):

> The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring [in Rule 65(d) of the Federal Rules of Civil Procedure] that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid. . . . The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension.

See also, *Terminal Railroad Association* v. *United States*, 266 U.S. 17, 29 (1924).

B. Considered as the Grant of a Preliminary Strike Injunction, the Order Denying the Motion To Dissolve the Temporary Restraining Order Would be Void and Could Not Support a Criminal Contempt Adjudication.

There is a supreme irony in the attempt to support the adjudication in criminal contempt by treating the temporary restraining order as if it had been converted into a preliminary injunction by denial of the motion to dissolve it. For were the order denying the motion to dissolve to be given the effect of a preliminary injunction it would constitute a void order which could not support an adjudication in criminal contempt. As a preliminary injunction, it would on the face of the papers have been an order beyond the power of the court to issue, and it would have been entered without notice and hearing of any kind upon the issue in dispute. The combination of lack of power and fundamental want of procedural due process produces a void order which there is no duty to obey.

As to want of power, section 4(a) and (e) of the Norris-LaGuardia Act provides that:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> * * *
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence. . . .

This flat denial of power to grant a strike injunction is lifted only to the limited extent of allowing issuance of a strike injunction to prohibit a breach-of-contract strike over a grievance subject to obligatory and determinative arbitration by agreement. *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235, 253–255 (1970). This narrow holding is emphasized by the conditions which must be satisfied before even such a limited strike injunction may be granted (*id.* at 253–254):

> Our holding in the present case is a narrow one. We do not undermine the vitality of the Norris-LaGuardia Act. We deal only with the situation in which a collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure. Nor does it follow from what we have said that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance. The dissenting opinion in *Sinclair* suggested the following principles for the

guidance of the district courts in determining whether to grant injunctive relief—principles that we now adopt:

"A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity —whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance." 370 U.S., at 228. (Emphasis in original.)

Accordingly, "in order to enjoin a labor dispute the court must find that both parties are required to arbitrate the dispute and the employer should be so ordered as a condition to such relief." *Emery Air Freight Corp.* v. *Local Union* 295, *Teamsters,* 449 F.2d 586, 589 (C.A. 2, 1971), cert. denied, 405 U.S. 1066 (1973); see also *Teamsters Local Union No. 795* v. *Yellow Transit Freight Lines,* 370 U.S. 711 (1962); *Amstar Corp.* v. *Meatcutters,* 468 F.2d 1372 (C.A. 5, 1972); *Parade Publications* v. *Philadelphia Mailers Union No. 14,* 459 F.2d 369 (C.A. 3, 1972); *Standard Food Products Corp.* v. *Bradenberg,* 436 F.2d 964 (C.A.

2, 1972); *United States Steel Corp.* v. *United Mine Workers*, 74 LRRM 2611 (C.A. 3, 1970); *L. A. Concrete Pumping* v. *Majich*, 84 LRMM 2652 (D.C.C.D. Cal., 1973), same case, 84 LRRM 2653 (D.C.C.D. Cal., 1973), stay denied pending appeal, 84 LRRM 2655 (C.A. 9, 1973); *Pullman, Inc.* v. *Boilermakers*, 354 F.Supp. 496 (D.C.E.D. Pa., 1972); *Simplex Wire & Cable Co.* v. *IBEW Local 2208*, 314 F. Supp. 885 (D.C.N.H., 1970).

The underlying controversy in this case had nothing to do with a breach-of-contract strike over an arbitrable dispute. The dispute, on the contrary, centered on the question of whether or not there was a contract at all (*supra*, pp. 3, 5-6, 7-8, 10, 31; *infra*, pp. 21a-51a). The Union claimed that there was no existing contract, that it sought a new contract, and that its strike was in support of its demand to negotiate to which the employers had refused to accede. The employers, on their part, claimed that there was an existing contract to which the Union was bound and that therefore they were not required to negotiate in accordance with the Union's request. A strike in support of the Union's position in this contract-no contract controversy is wholly outside the sphere of "a strike over an arbitrable grievance" (*Boys Markets*, 398 U.S. at 254), and section 4 of the Norris-LaGuardia Act continues therefore to divest a federal court of power to enjoin the strike. As the Court of Appeals for the Second Circuit explained in an exactly comparable situation (*Emery Air Freight Corp.* v. *Local Union 295, Teamsters*, 449 F.2d 586, 591 (C.A. 2, 1971), cert. denied, 405 U.S. 1066 (1973)):

> Turning to the June 22 preliminary injunction first, we do not see how it can stand under the governing law. It is quite clear that the major

dispute between the parties was whether a new contract existed. It was precisely this dispute which led to the impasse in negotiations and to the original call to strike on Thursday, April 22. Indeed, the trial court recognized this in its April 26 opinion. This dispute was not arbitrable because Emery and Local 295 had never agreed to make it so. Emery does not claim that this was an arbitrable question and the trial court did not so find. That the issue whether a new contract existed was decided by the court on June 11, after the evidentiary hearing of April 30, if anything, shows that no one regarded that issue as arbitrable. Therefore, under the Norris-LaGuardia Act, and the *Boys Markets* reading of it, the preliminary injunction was improper because the " 'strike * * * sought to be enjoined * * * [was not] over a grievance which both parties are contractually bound to arbitrate.' " 398 U.S. at 254, citing *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. at 228 (dissenting opinion).

Accordingly, in this case, were the District Court's denial of the motion to dissolve the temporary restraining order to be treated as a preliminary injunction prohibiting the strike, it would constitute a strike injunction that "No court of the United States shall have jurisdiction to issue . . . " (§ 4, Norris-LaGuardia Act).

Therefore, considered as a preliminary strike injunction, the order would have been clearly beyond the competence of the court to grant. This want of power would have been brigaded with utter failure to afford any notice and opportunity for hearing to show that power to issue the injunction was lacking. As the Union represented without contravention, "the temporary restraining order issued by the Superior Court . . . was issued without any kind of a hearing and with-

out any arguments on the merits at all (Tr. 15, *infra*, p. 16a); similarly, "the question of whether or not there is a contract between Local 70 and the various companies involved" is a matter as to which "There's never been any evidence presented" to the District Court either on the motion to dissolve or in the contempt proceeding (Tr. 78, *infra*, p. 17a); indeed, the District Court positively refused to receive evidence on the matter at the contempt hearing (Tr. 79, *infra*, p. 18a). Accordingly, there was never any notice or hearing on the critical issue of the District Court's want of power to issue a strike injunction in this contract—no contract controversy.

The combination of want of power and denial of procedural due process to show that want of power produces a void order which will not support a criminal contempt adjudication for failure to comply with it. It may no longer be uncritically true that "When . . . a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing in contempt is equally void." *Ex parte Fisk*, 113 U.S. 713, 718 (1885). But neither is it uncritically true that obedience is due to any order granted under any circumstances simply and solely because the issuing court has personal and subject matter jurisdiction. A lawless order is as much an affront to the rule of law as disobedience of it. And when the invalidity of the order, substantively and procedurally, is as patent as it would be here were the order given the status of a preliminary strike injunction, the balance must be struck in favor of freedom from fealty to a void command.

First, in this case, the want of power is crystal clear; the divestiture of power is fundamental; it is a basic part of the scheme by which Congress orders both the judicial process and industrial relations in this country; and the limited and circumspect accommodation worked by *Boys Markets* emphasizes the lack of power in any circumstances outside its compass. Accordingly, in this case, want of power to issue a strike injunction in this contract-no contract controversy admits of no "substantial doubt," *Boys Markets* itself having by prior and exact adjudication eliminated any possible question (*cf., United States* v. *United Mine Workers,* 330 U.S. 258, 294 (1947) (opinion of Vinson, C.J.)); the federal court thus operated under an "obvious limitation" on its power, and exercise of "power that has unquestionably been withheld" does not produce an order to which obedience can be exacted (*id.* at 310 (opinion of Frankfurter, J.)). Second, given the crucial issue of absence of judicial power, procedural due process to contest its exercise must be afforded; its grant is indispensable to the existence of any duty to obey an otherwise void order of the issuing court. *In re Green,* 369 U.S. 689 (1962). For lack of power plus lack of procedural due process deprives the proceeding of any genuine claim to judicial caliber. A court which couples exertion of power it does not have with denial of notice and hearing does not act as a court at all. In these circumstances the judge "would be a pretender to, not a wielder of, judicial power." *United States* v. *United Mine Workers,* 330 U.S. 258, 310 (1947) (opinion of Frankfurter, J.). Lastly, unlike *Walker* v. *Birmingham,* 388 U.S. 307, 315, 318–319 (1967), the Union did here seek dissolution of the temporary restraining order, and did not act until long after it had every reason to suppose that

the order had "expired" by operation of law. *Cf.*, *United States* v. *United Mine Workers*, 330 U.S. 258, 294 (1947) (opinion of Vinson, C.J.). There was thus no contumacious attitude which might to some degree offset the lack of power and want of procedural due process which otherwise plainly existed.

The upshot is that the adjudication in criminal contempt cannot possibly be supported by treating the temporary restraining order as a converted preliminary injunction. For on that premise the order is void and has no redeeming value which might justify a requirement that it must nevertheless be obeyed willy-nilly.

III. THE SUMMATION.

Acceptance of petitioners' view would result in a legal horror. A state temporary restraining order of limited duration would be converted into a strike injunction of unlimited duration merely by the act of removal; the denial of the motion to dissolve would seal the conversion without any opportunity to be heard on the federal court's lack of power to grant a strike injunction; and failure to comply with an order which at the very least one had every reason to suppose had expired and which the federal court could not issue or continue at all would be the basis of a criminal contempt conviction resulting in a $50,000 fine in the name of the need to preserve and vindicate judicial supremacy (R. 100–101). What emerges is the subversion of every juridical value which this case touches. To use removal as the means of converting an order of limited duration into one of unlimited duration has no support in any policy underlying removal; instead, "it assigns to removal proceedings a totally unintended

function," and operates "to effect a wholesale dislocation in the allocation of judicial business between state and federal courts" by working a result which neither court acting independently would sanction. *Boys Markets* v. *Retail Clerks Union,* 398 U.S. 235, 246–247 (1970). It recreates every mischief which the Norris-LaGuardia Act was designed to suppress—substantive freewheeling and procedural precipitance—[22] with no countervailing policy of any sort to be served by the regression. *Id.* at 249–253. And the result does not vindicate but would affront the dignity of law.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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December, 1973

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[22] Frankfurter and Greene, The Labor Injunction (1930); Witte, *The Federal Anti-Injunction Act,* 16 Minn. L. Rev. 638 (1932); Aaron, *Labor Injunctions In The State Courts—Part II: A Critique,* 50 Va. L. Rev. 1147, 1156–58 (1964); Cox and Bok, Labor Law, 70–76 (7th ed. 1969).

APPENDIX

APPENDIX

APPENDIX A

RELEVANT STATUTORY PROVISIONS

A. *The Federal Rules of Civil Procedure* provide in relevant part that:

Rule 52. Findings by the Court.

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. . . .

* * *

Rule 65. Injunctions

(a) PRELIMINARY INJUNCTION.

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes a part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied to save the parties any rights they may have to trial by jury.

(b) TEMPORARY RESTRAINING ORDER; NOTICE; HEARING; DURATION. A temporary restraining order may be granted without written or oral notice to the adverse party or his

attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

* * *

Rule 81. Applicability in General.

* * *

(c) REMOVED ACTIONS. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. . . .

B. *The Norris-LaGuardia Act* (47 Stat. 70, 29 U.S.C. § 101) provides in relevant part that:

SEC. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment.

* * *

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence.

* * *

SEC. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or

committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof.

(b) That substantial and irreparable injury to complainant's property will follow.

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief.

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, includ-

ing all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

C. *Section 527 of the California Code of Civil Procedures* provides in relevant part that:

An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complainant in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor....

No preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall appear from facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than 15 days or, if good cause appears to the court, 20 days from the date of such order. When the matter first comes up for hearing the party who obtained the temporary restraining order must

be ready to proceed and must have served upon the opposite party at least two days prior to such hearing a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application; if he be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order. The defendant, however, shall be entitled, as of course, to one continuance for a reasonable period, if he desire it, to enable him to meet the application for the preliminary injunction. The defendant may, in response to such order to show cause, present affidavits relating to the granting of the preliminary injunction, and if such affidavits are served on the applicant at least two days prior to the hearing, the applicant shall not be entitled to any continuance on account thereof. . . .

APPENDIX B

Excerpts From the Transcript of the Contempt Proceeding Not Printed in the Joint Appendix.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE: Hon. Alfonso J. Zirpoli, Judge

No. C-70-1057 AJZ

GRANNY GOOSE FOODS, INC., ET AL., *Plaintiffs*,

—VS—

BROTHERHOOD OF TEAMSTERS & AUTO-TRUCK DRIVERS, LOCAL NO. 70 OF ALAMEDA COUNTY, ET AL., *Defendants*

* * *

[2] WEDNESDAY, DECEMBER 2, 1970—10:35 A.M.

THE CLERK: Civil Case No. 70-1057, Granny Goose Foods, Inc., et al., versus Brotherhood of Teamsters and Auto-Truck Drivers, Local No. 70, et cetera, et al.; motion for contempt judgment.

Counsel will please state their appearances for the record.

MR. TICHY: For plaintiffs, Littler, Mendelson & Fastiff, by Wesley J. Fastiff, George J. Tichy and J. Richard Thesing.

MR. BEESON: Duane B. Beeson for Defendant Local 70.

THE COURT: All right, you may proceed, gentlemen.

MR. TICHY: Your Honor, before we proceed, I would like to make an opening statement, if I may.

THE COURT: Yes.

MR. TICHY: If you may remember, this was a proceeding which was initiated in State Court. There was a temporary restraining order issued, the matter was removed to Federal Court, on May 28, 1970, or May 27, 1970.

THE COURT: May 27.

* * *

MR. TICHY: Right. There was a motion to dissolve the modified temporary restraining order. This motion was [3] brought by the defendants in this case and the matter was submitted. And prior to the time of submission, the

Court was asked a very pertinent and germane question by Mr. Van Bourg, who was at that time arguing for defendants. And he asked what he should tell his clients about the status of this injunction, because he felt that the status of this injunction was that the Court was without jurisdiction to maintain its effectiveness, and therefore his clients were not bound by it. At that time you told him—

MR. BEESON: Your Honor, may I interject for just a moment? Because I think we are getting into an area that is going to preempt what I should bring to the attention of the Court as a threshold matter.

THE COURT: What is the threshold matter?

MR. BEESON: Your Honor, I am not prepared to go ahead today, and I would like to ask for a continuance for a reasonable time.

THE COURT: Well, let me make one observation in that regard, if I may.

MR. BEESON: Yes, Your Honor.

THE COURT: On the late afternoon of Monday, November 30, 1970, I believe it was Mr. Kenneth N. Silbert—

MR. BEESON: Yes, he is of our office.

THE COURT: Of your office?

MR. BEESON: Yes.

[4] THE COURT: One of the attorneys of record for the defendants in this case, and the respondents on this petition, appeared in my chambers together with Mr. Tichy, attorney of record for the plaintiffs, and acting for the plaintiffs.

And in the course of the discussion in chambers, when requested to give a hearing date on the order to show cause to be issued herein, he stated to the Court, after the Court had indicated the posture of its calendar and the fact that it would be able to hear this matter on Wednesday morning, December the 2nd—Counsel Silbert related that such statement was adequate notice and would be deemed notice to his clients. And I now certify that to be the record.

MR. BEESON: Well, of course, I am at a disadvantage here, Your Honor, and I would like to make this statement, however. Mr. Silbert at the present time is appearing in a case in Santa Clara County which had been set for today for a long time. He is the only person who could appear there. He went down there last night, I should say he left the office last night, before we received any notice of the hearing today. The papers came into my office about six o'clock in the evening, and I received them personally.

I told Mr. Tichy over the telephone that it would be impossible for Mr. Silbert to be there this morning because of this court hearing where he is presently engaged.

[5] Now, he expects to be back, as I understand it, somewhere around the noon hour today. I am personally and presently engaged in a contempt proceeding before Judge Sweigert of this court, Your Honor, and I have to be there at two o'clock and am supposed to be handling papers for the two o'clock appearance right at this very moment. Mr. Silbert should be back some time during the noon hour.

THE COURT: But we have irreparable harm, if the allegations are true—we have irreparable harm that's being perpetrated upon the plaintiffs in this case. If the allegations are true, it's harm that's arising by reason of an open defiance of a continuing order of this Court which this Court deems, and has indicated to be, in full force and effect.

MR. BEESON: I can understand the position set forth in the papers.

THE COURT: If those allegations are correct, am I to countenance a situation that permits this continuous and daily irreparable harm?

MR. BEESON: My motion for continuance, Your Honor, would be just until this afternoon, in order to let Mr. Silbert, who can handle it and is prepared with respect to the facts, make the proper representations to the Court. That's all I can ask at this time. It seems to me, Your Honor, we may get into a very serious problem otherwise.

[6] I have a previous commitment to be before Judge Sweigert at two o'clock this afternoon. It's perfectly plain to me on the bare reading of the papers that this cannot possibly be finished today. There are a number of problems.

THE COURT: That remains to be seen.

MR. BEESON: Yes, I understand that. But that's certainly our position, and I think that the kind of representations that we will make to the Court will bear that out.

THE COURT: Let me see if I understand your position correctly.

MR. BEESON: Yes, sir.

THE COURT: Your present position is that you will be ready to proceed at two o'clock?

MR. BEESON: Yes, sir.

THE COURT: And there is no question with relation to notice?

MR. BEESON: No, Your Honor, we are not going to raise that. I just need somebody here who can handle the case.

MR. TICHY: Your Honor, if I may address myself to Mr. Beeson's position? Not only on Monday did Mr. Silbert indicate that he would have adequate notice if we proceeded today, but as late as yesterday, when I contacted him, that we would probably be proceeding at ten o'clock this morning, [7] he advised me that he would have this matter in San Jose and asked that the matter not be started here until about 10:30 or 11:00. And I said, "Okay, I will certainly agree to start this matter at 10:30 if you will be available."

And he said yes, he would and on that basis we called up your secretary and changed the time to initiate this proceeding from 10:00 o'clock to 10:30.

Now, the problem we have here, Your Honor, is that not only has the picketing begun in the Oakland area, but it has spread to San Francisco now. It's also spreading up into Sacramento. We have virtually terminated the operations of these companies.

THE COURT: Well, that's the gamble or risk that somebody may be taking. I don't know. If the facts all develop as you contend they do, and if there is merit to your position and the evidence and the records sustain it, then that's the risk that the respondents will have to take.

MR. TICHY: Well, Your Honor, the problem that we see is this.

THE COURT: I don't think that this is a matter to be treated lightly.

MR. BEESON: I certainly agree with you, Your Honor. In Mr. Silbert's behalf, I just want to say that when he left the office about 5:30 last night, he did not have any notice before him, because we discussed this matter, that this [8] was going on at 10:30 this morning. It wasn't until shortly after 6:00 o'clock that the papers came over.

MR. TICHY: Your Honor, foreseeing this possibility, we sent telegrams not only to the Union itself but to Mr. Beeson's office, advising that this matter would be scheduled for 10:30 this morning. I have before me a receipt from Western Union confirming delivery of this at 12:25 yesterday.

MR. BEESON: I haven't seen that telegram, whatever it is.

MR. TICHY: And I believe a copy of the telegram is attached to the affidavit of Mr. Wesley J. Fastiff, which is on file in this matter.

THE COURT: Well, we have received a message that Mr. Silbert will be here in thirty minutes.

MR. BEESON: In thirty minutes?

THE CLERK: That will be probably around 11:00 o'clock. It was about five minutes ago.

THE COURT: Under the circumstances, the Court will take a recess for fifteen minutes. All right.

MR. BEESON: All right, thank you.

[Recess.]

THE CLERK: Civil Case No. 70-1057, Granny Goose Foods, Inc., et al., versus Brotherhood of Teamsters and Auto-

Truck Drivers, Local 70, et al. Counsel will again state their appearances for the record.

[9] MR. TICHY: For the plaintiffs, Littler, Mendelson & Fastiff by Wesley J. Fastiff, George J. Tichy and J. Richard Thesing.

MR. BEESON: For the defendant, Duane B. Beeson and Kenneth N. Silbert.

THE CLERK: Thank you, Counsel.

MR. BEESON: Your Honor, Mr. Silbert has arrived and is in the courtroom, as you can see, and we are prepared to go ahead in accordance with the arrangements that were made.

We have one or two preliminary motions, however, to address to this matter.

THE COURT: What is your motion?

MR. BEESON: The first motion, Your Honor, which I will make—only because I have had an opportunity to read the papers and Mr. Silbert has not—this will be about the limit of my participation in this case.

The motion is to sever what appears to be the request to institute a contempt proceeding from the civil contempt proceeding, which also has been instituted by this motion.

As I read the motion, Your Honor, particularly paragraph 3, it requests the Court to institute both kinds of proceedings. Of course the motion can be made to bring the civil contempt, and it has been brought, and we are here upon that. I don't know whether we are actually here on criminal contempt yet, because, as I understand the law in this respect, [10] there has to be a request for the Court to institute, give leave to institute a criminal contempt proceeding.

THE COURT: An order to show cause will suffice.

MR. BEESON: Yes, that's perfectly true. And unless the Court appoints counsel specially to prosecute the matter, the United States Attorney would have authority, inherent authority to prosecute the matter. I mention this only be-

cause the two are different. Now, they have been combined in this motion, or this order to show cause, if you will, and my motion is to sever the two.

And I have what I consider to be very good ground for it.

THE COURT: Well, the Court will this morning treat the matter as a motion for criminal contempt. The matter has been properly noticed, it's before the Court on an order to show cause. I don't think the United States Attorney need be the prosecuting officer. The parties who were aggrieved may appear through their counsel, and they have noticed this matter for such contempt, and the Court will treat it as such. This will not preclude any rights they may have with relation to civil contempt or any claim of damages that they may have, if there are any, arising out of the conduct of the respondents—if their conduct merits any remedy by way of damages.

MR. BEESON: I think that takes care of the problem, [11] Your Honor. I was going to ask that the criminal matter go first and be severed, because the rules with respect to civil and criminal are different. We do run into problems that can become very difficult if you try to combine the two, and Judge Sweigert has followed the ruling that Your Honor has just made in severing the two.

THE COURT: I am proceeding at this time on the order to show cause as it relates to the claim of criminal contempt.

MR. BEESON: Yes. Then I understand all the ordinary rules applicable to criminal contempt will be applicable here?

THE COURT: Yes.

MR. BEESON: All right, that's the only motion that I have, Your Honor. I think Mr. Silbert wants to make a motion also at this time.

MR. SILBERT: Your Honor, I first would like to apologize to the Court for arriving late. I told Mr. Tichy that I had

a 9:30 hearing in San Jose, and I got back as quickly as I could from that.

THE COURT: All right. I hope you didn't have trouble with the rain.

MR. SILBERT: Well, there was some hail also, but it's okay.

I have two motions to make. One is, first of all, a request of the Court. The papers were served on us last night, I take it at 6:00 o'clock. I haven't seen them until [12] I walked in just now, and I have not had an opportunity to read the supporting affidavits or the other papers, and I would like to have an opportunity to do that before we proceed.

In addition to that, our primary defense in this case is one that is not a factual issue. Our primary defense is that there's no outstanding order.

THE COURT: Well, I made a ruling on that before, and I am satisfied that there is an outstanding order. I am satisfied that my ruling of June 4th, in which I denied the motion to dissolve on the ground of lack of jurisdiction, continues in full force and effect the order.

I am satisfied that Section 1450 of Title 28, United States Code, is applicable, and under the circumstances this is an indication to you exactly what the position of the Court is.

MR. SILBERT: Well, I had not understood that you had ruled on that point and I would—

THE COURT: Well, my order of June 4th . . . . On May 19 the defendants and respondents in this case—May 19th of this year—filed a petition to remove the case to the Federal Court, and with it they filed a motion to dissolve the injunction, on the theory that the Sinclair case applied and that therefore this Court was obligated to dissolve an injunction granted by a State Court.

[13] On June 1st, the Supreme Court of the United States handed down its decision in the Boys Market case and expressly and specifically overruled the Sinclair case, upon

which the defendant had been relying. Based upon that decision in the Boys Market case, on June 4th the Court entered its order in which it said:

> "The controversy before the Court is clearly a labor dispute within the meaning of Section 301 of the National Labor Relations Act, as amended by 29 USC Section 185. Removal is proper under 28 USC Section 1441.
>
> "In the prior hearing the Court denied plaintiff's motion to remand. The only issue now before the Court is whether or not the District Court is mandated to dissolve the State Court temporary restraining order. The Supreme Court decision in the recent case of The Boys Markets, Inc. v. Retail Clerk's Union, Local 770, — U.S. — [June 1, 1970], is dispositive of the issue. Accordingly, IT IS ORDERED that the motion to dissolve the State Court temporary restraining order is DENIED."
>
> Dated June 4, 1970, signed by the Judge.

The effect of this denial of the motion to dissolve is to keep in full force and effect the temporary restraining [14] order issued by the Superior Court of the State of California in and for the County of Alameda. It remains in full force and effect by reason of the order and by reason of the operation and the provisions of Section 1450 of Title 28, United States Code, which in its pertinent language provides that:

> "All injunctions, orders and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the District Court."

Since the order of June 4th, the file does not reflect that the defendants have filed any responsive pleading by way

of answer or otherwise, or taken any other action in the premises. It may very well be that the peace in the labor and management department prevailed and made such actions seemingly unnecessary. But the plaintiffs have now come forward with a petition in which they set forth conduct which they allege to be in contempt of the Court's order.

The circumstances are such, and notice having been given and acknowledged, that the matter is now ripe for hearing before the Court, to ascertain from the facts presented to the Court whether in truth and in fact there has been a contempt of the injunction issued by the State Court, which becomes for all purposes an order of this Court subsequent to removal.

MR. SILBERT: Well, Your Honor, I understand your [15] ruling now. It's our position that the order, the temporary restraining order issued by the Superior Court, I believe it was issued on May 13—that was issued without any kind of a hearing and without any arguments on the merits at all. And according to Section 527 of the California Code of Civil Procedure, such temporary restraining orders are in effect for only fifteen days.

THE COURT: Well, the only thing is, 1450 is now controlling, that's Title 28 United States Code, not California practice.

MR. SILBERT: Right. Well, we do not understand Section 1450 to have the effect of expanding either the breadth or the length of a State Court order.

THE COURT: That order was never dissolved. It is in full force and effect.

MR. SILBERT: Well, on the grounds that we believe that there's no order outstanding now, I'd move that the order to show cause in this case be quashed.

THE COURT: The motion is denied.

MR. SILBERT: May I have time, then, to read the affidavits that have been filed before we proceed?

THE COURT: Yes.

MR. SILBERT: It will only take a few minutes.

THE COURT: All right, you may read the affidavits. You have in mind, Counsel, that the substance of the affidavits [16] was recited to you in chambers on the late afternoon of November 30th.

MR. SILBERT: Yes. They look much more extensive than anything that was stated in chambers.

THE COURT: All right.

• • •

MR. SILBER: Your Honor, I have had a chance to read the papers.

THE COURT: All right, then, you may proceed, Mr. Tichy.

• • •

[77] THE COURT: Does the plaintiff rest?

MR. TICHY: At this time, Your Honor, plaintiff does rest. I wish to indicate that because of the urgency of this matter, we have chosen not to call additional witnesses with regard to the—

[78] THE COURT: Oh, all I am interested in is whether you rest or not.

MR. TICHY: Yes, we do.

THE COURT: You rest? All right, you may proceed.

MR. SILBERT: Your Honor, before I proceed, I have a motion to make.

THE COURT: Yes?

MR. SILBERT: The basis of this entire case is something we haven't heard very much about yet, and that's the question of whether or not there is a contract tbetween Local 70 and the various companies involved. There's never been any evidence presented to the Court on that matter, either to this Court or to the Superior Court where the temporary restraining order was issued.

The only discussion of that at all that I can recall was a very brief one in Judge Lercara's chambers, and certainly it could not be called a full litigation of that issue.

The underlying question of law as to whether or not there is a contract is a rather unusual one for the Federal District Court. It's one that's commonly considered by the Labor Board. It's an unusual one for the District Court. That is a question as to whether or not the companies involved here were part of a multi-employer bargaining group, and whether or not because of their membership in that group they became parties to a national agreement. And also whether or [79] not Local 70 effectively withdrew itself from that multi-employer, multi-union bargaining situation. That case is currently pending before the Labor Board, the companies involved here filed charges with the Labor Board.

The Labor Board has issued a complaint and a trial is presently scheduled on that complaint on February 2.

The issue to be litigated there is whether or not there is a contract between these parties, and of course if the Labor Board finds that there was never any contract, there was no strike clause, there was no basis for the issuance of a temporary restraining order.

THE COURT: The Court does not deem that to be relevant to the contempt hearing presently before it.

MR. SILBERT: I understand that, Your Honor, but we feel that this is a case—first of all, we understand that in cases involving contract violations, or alleged contract violations, which are also arguably unfair labor practices, that the Federal District Courts have concurrent jurisdiction with the Labor Board, but we feel because of the unusual nature of this case, the entire proceedings should be decided by the Labor Board, rather than two different forums, where we can get conflicting decisions. And we would request as a matter of comity that this case be referred to the Labor Board and not decided by the District Court.

THE COURT: That request is denied. The restraining [80] order sought to preserve conditions until the cause could be determined, and obedience of the defendants would

have achieved this result. They have had full opportunity to comply with the order, but they have deliberately refused obedience, presumably, at least up to this point there is no evidence to the contrary, and determine for themselves the validity of the order.

Now, that's the language that I just read from the United States versus Mine Workers, and that pretty much is the legal posture in which we now find ourselves.

So now it's incumbent upon the respondents to proceed. Is there a responsible officer of the respondent here?

MR. SILBERT: Your Honor, I have a problem in that regard. As you know, we were first informed of this entire proceeding informally in your chambers, and that was a day and a half ago.

THE COURT: Well, there should be someone here. Didn't take them long to get people on the picket line, if the evidence is correct, including telephone calls at 5:00 a.m. That's a pretty good indication of the kind of resourcefulness that exists, that would enable them to have an officer here this afternoon.

MR. SILBERT: Well, Your Honor, I have had a chance to confer with the clients only very briefly, and I did that during the recess that we had for lunch. I have not had time [81] to confer with them to the extent we could prepare any kind of an adequate defense at this point.

There is also an additional problem, in that decisions of this kind, as far as the Union is concerned, should be made by its executive board, and they have not had time to consider it before their executive board.

THE COURT: Well, that's their responsibility. The matter is on for hearing now.

MR. SILBERT: I understand that, Your Honor.

THE COURT: And if you have some evidence, I am prepared to hear it. If you don't, the matter will be submitted.

MR. SILBERT: Well, Your Honor, I would request the continuance until Monday of next week, so that we can speak to our clients and have them consider their position and

how they would like to proceed, so that we can consider it.

THE COURT: In view of the urgency involved here, the request for continuance until next Monday is denied.

Now, are you prepared to go ahead?

MR. SILBERT: Well, I have a very bad problem, Your Honor. My clients are involved in another court proceeding in Judge Sweigert's courtroom.

THE COURT: Well, I haven't heard of any reason why your clients, with whom you were presumably in contact at noon, couldn't be here to proceed, so I am ready to rule if [82] you aren't ready to give me any evidence.

MR. SILBERT: We feel this is a very serious matter for the Union, and we would like to present a defense. And I don't feel that in the short amount of time we have had, that short notice we have had, we can adequately represent our clients at this time. I cannot proceed with any defense.

THE COURT: All right, then, considering the nature of the case, the urgency involved, the case is submitted and I am going to make a ruling now.

[The ensuing and concluding parts of the transcript of the contempt proceeding are printed at pages 96-102 of the Joint Appendix.]

APPENDIX C

195 NLRB No. 120

D-5956
Oakland, Calif.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BROTHERHOOD OF TEAMSTERS AND AUTO TRUCK DRIVERS LOCAL No. 70, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA

and

Case 20—CB—2227—1

GRANNY GOOSE FOODS

and

Case 20—CB—2227—2

LADY'S CHOICE FOODS, DIVISION OF EARLY CALIFORNIA FOODS, INC.

and

Case 20—CB—2227—3

NATIONAL BISCUIT COMPANY

and

Case 20—CB—2227—4

STANDARD BRANDS, INC.

and

Case 20—CB—2227—5

SUNSHINE BISCUIT COMPANY

Decision and Order

On September 13, 1971, Trial Examiner Stanley Gilbert issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed limited cross-exceptions and a brief in answer to the Respondent's exceptions and in support of the Trial Examiner's Decision, and the Charging Parties filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order [1] as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that Respondent, Brotherhood of Teamsters and Auto Truck Drivers Local No. 70, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's recommended Order, as modified herein:

1. Substitute the following for paragraph 1(a):

"(a) Refusing to give full force and effect to the National Master Freight Agreement and the Joint Council No. 7

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[1] See *Brotherhood of Teamsters & Auto Truck Drivers Local No. 70, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (California Trucking Association, Inc.)*. 194 NLRB No. 106.

[2] The General Counsel contends the Trial Examiner's Order should specifically name the Charging Parties herein. We agree and will modify the Order accordingly.

The Charging Parties except to the Trial Examiner's recommended Order contending that the Trial Examiner failed to recommend that Respondent be ordered to mail copies of the notice to all of its members and that Respondent be ordered to read the notice to its membership at each of two consecutive monthly meetings. We agree that the Respondent should be ordered to send copies of the notice to its entire membership and will so provide; however, we do not believe that Respondent's conduct herein warrants that it be ordered to read the notice at its membership meetings.

Supplement thereto for the contract term April 1, 1970, to June 30, 1973, with respect to employees of Granny Goose Foods; Lady's Choice Foods, Division of Early California Foods, Inc.; National Biscuit Company; Standard Brands, Inc.; and Sunshine Biscuit Company in the following classifications: All drivers, hostlers, lift jitney operators, fork-lift operators, platform men, new furniture helpers, and helpers."

2. Substitute the following for paragraph 2(b) (the Trial Examiner's footnote 12 will be retained as set forth in his Decision).

"(b) Post at its union offices in Oakland, California, and distribute to its membership by mail or other means, copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by one of Respondent's representatives, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material."

Dated, Washington, D.C.

February 17, 1973

John H. Fanning,	Member
Howard Jenkins, Jr.	Member
Ralph E. Kennedy,	Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

TXD-(SF)-110-71
Oakland, Calif.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

BROTHERHOOD OF TEAMSTERS AND AUTO TRUCK DRIVERS LOCAL No. 70, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA

and

Case No. 20-CB-2227-1

GRANNY GOOSE FOODS

and

Case No. 20-CB-2227-2

LADY'S CHOICE FOODS, DIVISION OF EARLY CALIFORNIA FOODS, INC.

and

Case No. 20-CB-2227-3

NATIONAL BISCUIT COMPANY

and

Case No. 20-CB-2227-4

STANDARD BRANDS, INC.

and

Case No. 20-CB-2227-5

SUNSHINE BISCUIT COMPANY

Morton H. Orenstein, for the General Counsel
Wesley J. Fastiff, of *Littler, Mendelson & Fastiff*, of San Francisco, Calif., for the Charging Parties.

Levy & Van Bourg, of San Francisco, Calif., by *Victor J. Van Bourg, Stewart Weinberg*, and *Michael B. Roger*, for Respondent.

Trial Examiner's Decision

STATEMENT OF THE CASE

STANLEY GILBERT, Trial Examiner: Based upon charges filed on April 20, 1970, by Granny Goose Foods, hereinafter referred to as Granny Goose; by Lady's Choice Foods, Division of Early California Foods, Inc., hereinafter referred to as Lady's Choice; by National Biscuit Company, hereinafter referred to as Nabisco; by Standard Brands, Inc., hereinafter referred to as Standard; and by Sunshine Biscuit Company, hereinafter referred to as Sunshine, in Cases Nos. 20-CB-2227-1, 20-CB-2227-2, 20-CB-2227-3, 20-CB-2227-4 and 20-CB-2227-5, respectively, the consolidated complaint herein was issued on October 30, 1970.

The complaint, as amended, alleges that Brotherhood of Teamsters and Auto Truck Drivers Local No. 70, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, hereinafter referred to as the Respondent, violated Section 8(b)(1)(B) and 8(b)(3) of the National Labor Relations Act. By its answer, Respondent denies that it committed the unfair labor practices alleged in the complaint and, in addition alleges various affirmative defenses.

Pursuant to notice, a hearing was held in San Francisco, California, on March 16, 17 and 18, April 27, 28, 29 and 30, and May 3, 4 and 5, 1971, before the undersigned, duly designated as Trial Examiner. All parties were represented by counsel and filed briefs within the time designated therefor.

Upon the entire record in this proceeding and my observation of the witnesses as they testified, I make the following:

FINDINGS OF FACT

I. The Business of the Companies Involved Herein

The five companies involved herein are the Charging Parties. It is alleged in the complaint as follows:

(a) At all times material herein, Granny Goose, a California corporation with places of business located throughout the United States, including a facility located in Oakland, California, has been engaged in the processing, distribution and wholesale sale of potato chips and other food products.

(b) During the past year, Granny Goose, in the course and conduct of its business operations, sold and shipped goods and products valued in excess of $50,000 from its facilities in the State of California directly to non-retail purchasers located outside the State of California.

(c) At all times material herein, Lady's Choice, a California corporation with places of business located throughout the United States, including a facility located in Hayward, California, has been engaged in the processing, distribution and wholesale sale of pickles and other food products.

(d) During the past year, Lady's Choice, in the course and conduct of its business operations, sold and shipped goods and products valued in excess of $50,000 from its facilities in the State of California directly to non-retail purchasers located outside the State of California.

(e) At all times material herein, Nabisco, a Delaware corporation with places of business located throughout the United States, including a facility in Oakland, California has been engaged in the processing, distribution and wholesale sale of bakery products.

(f) During the past year, Nabisco, in the course and conduct of its business operations, sold and shipped goods and products valued in excess of $50,000 from its facilities in the State of California directly to non-retail purchasers located outside the State of California.

(g) At all times material herein, Standard, a Delaware corporation with places of business located throughout the United States, including a facility located in San Francisco, California, has been engaged in the processing, distribution and wholesale sale of food products.

(h) During the past year, Standard, in the course and conduct of its business operations, sold and shipped goods and products valued in excess of $50,000 from its facilities in the State of California directly to non-retail purchasers located outside the State of California.

(i) At all times material herein, Sunshine, a New York corporation with places of business located throughout the United States, including a facility located in Oakland, California, has been engaged in the processing, distribution and wholesale sale of bakery products.

(j) During the past year, Sunshine, in the course and conduct of its business operations, sold and shipped goods and products valued in excess of $50,000 from its facilities in the States of California directly to non-retail purchasers located outside the State of California.

By its answer, Respondent admits the foregoing allegations, and said allegations are found as facts herein.

As is admitted by Respondent, each of the above-mentioned employers has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

As is admitted by Respondent, it has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act and it has been affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein referred to as IBT.

III. The Unfair Labor Practices

Respondent admits, and it is found, as follows:

> For a number of years, and at all times material herein, Respondent has represented a majority of the drivers, hostlers, lift jitney operators, forklift operators, platform men, new furniture helpers and helpers employed by each of the Charging Employers within Respondent's geographical jurisdiction and, by virtue of Section 9(a) of the Act, Respondent has been, and now is, the exclusive representative of all the said employees for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

Essentially the unfair labor practices litigated herein are whether or not Respondent violated Section 8(b)(3) and 8(b)(1)(B) of the Act by refusing to abide by a contract and supplement thereto[1] for the period April 1, 1970, to June 30, 1973, arrived at in multiunion-multiemployer bargaining negotiations which covered the aforesaid employees

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[1] Referred to herein as the National Master Freight Agreement and its Joint Council No. 7 Supplement.

of the Charging Parties,[2] and by attempting to coerce each of the Charging Parties to bargain with it for a separate contract. As is set forth more fully below, a contract and supplemental agreement for 1970-1973 were negotiated by said multiunion-multiemployer bargaining unit. The record clearly establishes that Respondent refused to abide by said contract and supplemental agreement *vis-a-vis* the Charging Parties and sought to negotiate a separate contract with them. The primary questions[3] to be resolved herein are whether Respondent and the Charging Parties were members of said multiunion-multiemployer bargaining unit and whether Respondent effected a timely withdrawal from said bargaining unit. There is little or no dispute as to the material facts, but rather as to what inferences may appropriately be drawn therefrom. The findings herein are based upon credited testimony and documentary evidence in the record.

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[2] The allegation in the complaint that Respondent violated Section 8(b)(3) of the Act by refusing to accept and be bound by said 1970-1973 agreement and supplement thereto appears, by its language, to extend to other employers as well as the employers involved herein. However, it is not clear from the record herein that the parties attempted to litigate the question of whether Respondent's refusal extended to said other employers. It is not that said issue apparently was fully considered in Case No. 20-CB-2242, *Brotherhood of Teamsters & Auto Truck Drivers Local No. 70, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (California Trucking Association, Inc.)*, that Trial Examiner Herman Corenman issued his decision therein on August 4, 1971, TXD-(SF)-99-71, and that he found that Respondent violated Section 8(b)(3) and 8(b)(1)(B) of the Act by refusing to be bound by said agreement and supplement thereto and by coercive means sought to bargain individually with members of the multiemployer bargaining unit who were members of the California Trucking Association, Inc., an employer association whose representatives participated in said negotiations. The Charging Parties herein are not members of said Association.

[3] Essentially these are the questions considered in Respondent's brief which recites that it "is addressed solely to the salient issues raised . . . ."

The Multiunion-Multiemployer Bargaining Unit

Commencing in 1964, it has been the practice in the trucking industry for representatives of a group of the various Teamsters locals and a group of various trucking employers to negotiate national agreements and supplemental agreements covering local areas. The Respondent has been one of the local Teamsters unions which participated in such bargaining which led to contracts and supplemental agreements for the periods 1964-1967 and 1967-1970.

As stated hereinabove, Respondent is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. IBT is divided into four geographical jurisdictions including the Western Conference of Teamsters which comprises locals in eleven western states including California. The Western Conference of Teamsters is further broken down into groups of various locals in certain geographical areas including a group known as Joint Council No. 7. Joint Council No. 7 embraces locals in the San Francisco Bay Area including Respondent which represents employees of various employers in the Bay Area including employees of the Charging Parties. The record is clear that Respondent was a member of the multiunion group which negotiated the 1964-1967 and 1967-1970 National Master Freight Agreements and the Joint Council No. 7 Supplements thereto.

The multiemployer group consists of various state and area employer associations as well as individual employers. An entity was formed called the Trucking Employers, Inc., herein referred to as TEI, which ultimately became the bargaining representative for the multiemployer group.

The Charging Employers' Membership in the Multiunion-Multiemployer Bargaining Group

It is the General Counsel's position, as well as that of the Charging Parties, that at the time negotiations started for the 1970-1973 contract and supplements thereto all of the

Charging Parties were members of the multiunion-multiemployer bargaining unit. On the other hand, the Respondent contends that they were not, that historically it has bargained with each of said Charging Parties individually. Hereinbelow is set forth a resume of the facts material to this dispute with respect to each of the said Charging Parties.

Granny Goose. On February 5, 1965, Granny Goose and Respondent entered into an agreement which provided as follows:

> It is hereby agreed by and between: Granny Goose Foods, Inc. .....,[4] hereinafter called the Union, that the Employer hereby adopts and agrees to be bound by all the terms and conditions of the NATIONAL MASTER FREIGHT AGREEMENT, THE JOINT COUNCIL AND LOCAL 70 LOCAL PICKUP AND DELIVERY AGREEMENT, effective July 1, 1964, to and including March 31, 1967, except as hereinafter provided.
>
> The terms of said agreement shall be altered as follows:
>
> 1. All references to the Association shall be considered deleted. In its place, the name of the individual employer signatory to this agreement shall be considered as substituted.
> 2. Article V, dealing with disputes and grievances, shall be referred to a committee consisting of two representatives of the Employer signatory to this agreement and two (2) representatives of the Union.

By letter dated January 6, 1967, Respondent wrote to Granny Goose as follows:

> You are hereby notified that the NATIONAL OVER-THE-ROAD AND CITY CARTAGE POLICY AND NEGOTIATING COM-

[4] Although this line is blank, it is apparent from the context that Respondent's name was understood to be in this blank space as the other party to the agreement.

MITTEE, the WESTERN CONFERENCE OF TEAMSTERS, and the undersigned LOCAL UNION as bargaining agents for the involved employees desire to negotiate changes or revisions in the NATIONAL MASTER FREIGHT AGREEMENT and in all AREA, REGIONAL and LOCAL SUPPLEMENTS, ADDENDAS, APPENDICES or RIDERS thereto for the contract period commencing April 1st, 1967 as provided in Article 37 thereof.

If you will not be represented in such negotiations by any Employer Association and desire individual notice of the time and place of future negotiating meetings, please advise this office and the office of the Western Conference.

We enclose herewith, a copy of Article XVI, Sections 4, 5 and 6, of the Constitution of the International Brotherhood of Teamsters so that you may be informed of the union's requirement for entering into a binding agreement.

Apparently Granny Goose made no reply to said letter. The record does not disclose that there was any communication, written or verbal, between Granny Goose and Respondent with respect to Granny Goose agreeing to be bound by the 1967-1970 national agreement and pertinent supplement thereto. It appears, however, that the parties adhered thereto.

Lady's Choice. By letter dated September 23, 1963, Respondent wrote to Lady's Choice as follows:

You are hereby notified that the National Over-the-Road and City Cartage Policy and Negotiating Committee and the undersigned Local Union, as bargaining agents for the involved employees, desire to terminate the Local 70 Local Pickup and Delivery Agreement for the contract period commencing July 1, 1964, and to enter into a National Agreement.

If you will not be represented in such negotiations by any Employer Association and desire individual notice

> of the time and place of future negotiating meetings, please advise the office of the WESTERN MASTER FREIGHT DIVISION OF THE WESTERN CONFERENCE OF TEAMSTERS, Flood Building, Room 605, 870 Market Street, San Francisco, California.

On July 16, 1964, Lady's Choice executed a document which reads as follows:

> By our signature hereby we signify our commitment to execute the National Master Freight Agreement and the Over-the-Road and Pick-Up and Delivery Supplements thereto for the period of July 1, 1964 to March 31, 1967, and to be bound by the terms and conditions thereof.

By letter dated June 9, 1967, Respondent notified Lady's Choice of the changes which were negotiated in the 1967-1970 national agreement and supplement thereto. It appears that Respondent and Lady's Choice adhered to the 1967-1970 national agreement and supplement thereto.

Nabisco. In a letter dated July 6, 1965, from Nabisco to Respondent, Nabisco wrote as follows:

> It is hereby agreed that National Biscuit Company will be governed by the terms of the current Local Pick-up and Delivery Agreement, for the remainder of its present term, between California Trucking Associations, Inc., Drayman's Association of San Francisco and Brotherhood of Teamsters and Auto Truck Drivers Local 70 covering driver members of Local 70 who deliver National Biscuit Company products from their Emeryville, California Plant to retail outlets.

On December 12, 1966, James R. Hoffa, Chairman for the Teamsters Negotiating Committee, notified Nabisco that said committee "on behalf of each of the Teamsters Locals and affiliates, . . ." desired to negotiate changes and revisions in the terms of the national agreement and supple-

ment thereto for the contract period commencing April 1, 1967. Said letter further stated as follows:

> If you will not be represented at such negotiations by any Employer Association, and desire individual notice of the time and place of future negotiation meetings, please so advise this office.

It appears Nabisco made no rely to the aforesaid letter. Similar notices with respect to negotiations on a national level and the area level were sent by Respondent to Nabisco asking if Nabisco desired notice of a time and place of negotiating meetings. It appears that Nabisco made no request for such notices. By letter dated July 10, 1967, from Nabisco to Respondent, Nabisco wrote as follows:

> It is hereby agreed that the National Biscuit Company, Emeryville, California will be governed by the terms of the current Local Pick-up and Delivery Agreement, effective April 1, 1967, to and including March 31, 1970, between California Trucking Association, Inc., Drayman's Association of San Francisco and Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70 covering the Drivers, members of Local Union No. 70, who deliver National Biscuit Company products from their Emeryville, California Plant to retail outlets.

Although the aforesaid letter of Nabisco with respect to the 1967-1970 contractual period refers only to "Local Pick-up and Delivery Agreement," which is titled "Joint Council No. 7 Local Pickup and Delivery Supplemental Agreement," it is noted that said supplemental agreement recites as follows: "This Agreement is supplemental to and becomes a part of the National Master Freight Agreement . . . ." It is further noted that the supplemental agreement by its terms does not constitute a complete bargaining agreement, and, therefore, it is considered that by its letter of July 10, 1967, Nabisco agreed to become bound by the terms and provisions of the national agreement as well as the Joint Council No. 7 Supplemental Agreement.

Standard. Standard and Respondent subscribed to an agreement on June 15, 1965, and July 9, 1965, respectively, which provided as follows:

> It is hereby agreed by and between STANDARD BRANDS SALES COMPANY (subsidiary of STANDARD BRANDS, INC.) and TEAMSTERS LOCAL 70, hereinafter called the Union, that the Employer hereby adopts and agrees to be bound by all the terms and conditions of the NATIONAL MASTER FREIGHT AGREEMENT, THE JOINT COUNCIL AND LOCAL 70 LOCAL PICKUP AND DELIVERY AGREEMENT, effective July 1, 1964, to and including March 31, 1967, except as hereinafter provided.
>
> The terms of said agreement shall be altered as follows:
>
> 1. All references to the Association shall be considered deleted. In its place, the name of the individual employer signatory to this agreement shall be considered as substituted.
> 2. Articles 8, and 42, dealing with disputes and grievances, shall be referred to a committee consisting of 2 (two) representatives of the employer signatory to this agreement and 2 (two) representatives of the Union.
> 3. This agreement is limited to the employer's employees known as local pickup and delivery drivers working out of 921 - 98th Ave., Oakland, California.
> 4. Holidays—New Year's Day
>
> Washington's Birthday
> Memorial Day
> Fourth of July
> Admission Day
> Labor Day
> Veteran's Day
> Thanksgiving Day
> Christmas Day

5. On dollar ($1.00) per day in addition to the applicable rate in the National Master Freight Agreement will be paid to all drivers performing customer Yeast delivery service when such service requires the driver to determine the amount of Yeast the customer needs and/or how much he should bring on his next trip and/or when the driver puts away, rotates and/or unwraps the Yeast as a customer service.

By letter dated January 6, 1967, Respondent notified Standard of a desire to negotiate changes or revisions in the national and supplemental agreements for the period commencing April 1, 1967, and requested advice if Standard wished to be notified of the time and place of negotiating meetings. Standard did not request such notification. Apparently sometime in July 1967, Standard and Respondent entered into an agreement which provided as follows:

> It is hereby agreed by and between STANDARD BRANDS SALES COMPANY (subsidiary of STANDARD BRANDS, INC.) and TEAMSTERS, LOCAL 70, hereinafter called the Union, that the Employer hereby adopts and agrees to be bound by all the terms and conditions of the NATIONAL MASTER FREIGHT AGREEMENT, THE JOINT COUNCIL AND LOCAL 70 PICKUP AND DELIVERY AGREEMENT, effective April 1, 1967, to and including March 31, 1970.

Said agreement included the alterations embodied in the aforesaid agreement entered into in 1965 as well as three additional alterations with respect to "overnight layovers," the pay scale and a penalty for discrepancies in employees' applications for employment.

Sunshine. By letter dated November 4, 1964, Sunshine wrote Respondent as follows:

> It is hereby agreed that Sunshine Biscuits, Inc. will be governed by the terms of the current Local Pick-up and Delivery Agreement, between California Trucking

> Associations, Inc., Drayman's Association of San Francisco and Brotherhood of Teamsters and Auto Truck Drivers Local 70, Alameda County, covering driver members of Local 70 who deliver Sunshine Products from their Oakland, California plant to retail outlets.[5]

By letter of January 6, 1967, Respondent notified Sunshine of a desire to negotiate changes in the national and supplemental agreements and requested advice as to whether Sunshine wished notice of the time and place of future negotiating meetings. Sunshine did not respond to said letter. By letter dated July 21, 1967, Sunshine wrote to Respondent as follows:

> It is hereby agreed that Sunshine Biscuits, Inc. will be governed by the terms of the current National Master Freight Agreement, the Joint Council and Local 70 Pick-up and Delivery Supplemental Agreement, covering Teamster members of Local 70 who handle and deliver Sunshine Products from their Oakland, California plant to retail outlets.

It is concluded that all of the Charging Parties agreed to be bound by the terms of the National Master Freight Agreements and the Joint Council No. 7 Supplements thereto for the 1964-1967 and the 1967-1970 periods, to which Respondent was also bound. It appears that the Respondent does not dispute that fact, but, rather, argues that the history of its bargaining relations with the Charging Parties[6] demonstrates that each one bargained indi-

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[5] For the reasons indicated hereinabove with respect to a similar agreement executed by Nabisco, it is considered that by this letter Sunshine agreed to become bound by the terms and provisions of the national agreement as well as the Joint Council No. 7 Supplement thereto.

[6] Said history is summarized hereinabove.

vidually with Respondent and by adopting, on a "me too" basis, the agreements which had been negotiated by the multiunion-multiemployer groups they did not become members of the multiemployer group.

It is noted that the Board has held that mere adoption by an employer of an agreement which had been negotiated by a multiemployer group does not, without more, make the employer a member of the multiemployer bargaining unit. *Moveable Partitions, Inc.*, 175 NLRB No. 149. It is well established, however, that an employer becomes a member of a multiemployer bargaining unit when said employer enters into an agreement with the union in which it has clearly expressed a willingness to be bound by the multiemployer unit bargaining negotiations, *Weyerhaeuser Company*, 166 NLRB 299, even though there be a reservation requiring limited separate negotiations. *The Kroger Co.*, 148 NLRB 569, 574.

The 1964-1967 and the 1967-1970 National Master Freight Agreements contain the following provisions:

> Article 1
>
> Parties to the Agreement
>
> Section 1. Employers Covered
>
> *The Employer consists of* Associations, members of Associations who have given their authorizations to the Associations to execute this Agreement and Supplemental Agreements, members of Associations who have not given such powers of attorney, and *individual Employers who become signatory to this Agreement and Supplemental Agreements* as hereinafter set forth. The signatory Associations enter into this Agreement and Supplemental Agreements on behalf of their members under and as limited by their authorizations. [Underlining supplied.]
>
> • • • •

Article 2

Scope of Agreement

Section 4. Single Bargaining Unit

The employees covered under this Master Agreement and the various Supplements thereto shall constitute one bargaining unit. It is understood that the printing of this Master Agreement and the aforesaid Supplements in separate Agreements is for convenience only and is not intended to create separate bargaining units.

This National Master Agreement covering city and road operations of the authorizing members of Trucking Employers, Inc., and the other Associations which have participated in the collective bargaining have resulted from joint collective bargaining negotiations as to common problems and interests in respect to basic terms and conditions of employment, *and such Master collective bargaining agreement and Supplements thereto cover a single bargaining unit for the purposes of collective bargaining. Accordingly, the Associations and Employers which are parties to this Agreement acknowledge that they are part of a multi-employer collective bargaining unit which is comprised of* the following named Associations and those of their members which have or will authorize such Associations to represent them for the purpose of collective bargaining, and only to the extent of such authorization, and *such other individual Employers which have or may singly become parties to the Agreement.* [Underlining supplied.]

• • • •

Article 7

Local and Area Grievance Machinery

Provisions relating to Local, State and Area Grievance Machinery are set forth in the applicable Supplements to this Agreement.

• • • •

Article 31

Multi-Employer Unit

The undersigned Employer agrees to become a part of the multi-employer unit established by this National Master Agreement, and to be bound by the interpretations and enforcement of this National Master Agreement.

The Employer further agrees to participate in joint negotiations of any modification or renewal of this Agreement and to remain a part of the multi-employer unit set forth in such renewed Agreement. [Underlining supplied.]

It is concluded that by agreeing to be bound by the terms of the above-said agreements (which contained the above-quoted provisions of the national agreements), the Charging Parties clearly expressed a willingness to be bound by the negotiations of the multiunion-multiemployer groups and, therefore, were members of the multiunion-multiemployer bargaining unit.[7] It is clear, and apparently the Respondent does not dispute, that the Respondent was a member of the multiunion group which negotiated the 1964-1967 and 1967-1970 National Master Freight Agreements and the Joint Council No. 7 Supplements thereto. Furthermore, it is apparent from the communications from Respondent to various Charging Parties notifying them of the desire to negotiate changes and revisions in the existing agreement for the periods 1967-1970 and 1970-1973 the Respondent considered itself and the Charging Parties to be members of the multiunion-multiemployer bargaining unit. (The communications with respect to the negotiations for the 1967-1970 agreement and supplement thereto are set forth hereinabove.) With respect to the negotiations for the 1970-1973 agreement by the multiunion-multiemployer groups, notices thereof were sent by the National

[7] The changes noted in Respondent's agreements with Granny Goose and Standard, as set forth hereinabove, do not affect this conclusion. *The Kroger Co., supra.*

Committee on November 24, 1969, and by Respondent on December 19, 1969. Respondent's aforesaid letter contained, *inter alia*, the following:

> If you will not be represented in such negotiations by any Employer Association and desire individual notice of the time and place of future negotiating meetings, please advise this office and the office of the Western Conference.

It appears that none of the Charging Parties made any response to either of the notices received from the National Teamsters Committee or the Respondent. It is concluded that by their silence each of the Charging Parties indicated their continued willingness to be bound by the negotiations of the multiunion-multiemployer groups for the 1970-1973 contracts.

Negotiation of the 1970-1973 Agreements

On November 17 and 18, 1969, and again on November 30 and December 1, 1969, the negotiating committee of the multiunion group met to discuss bargaining proposals to be made to the employer group. On December 7 and 8, 1969, two delegates from each of the 363 Teamsters locals comprising the multiunion group met and unanimously approved the proposals suggested by the negotiating committee. On January 7, 1970, the negotiating committee for the multiunion group met with the negotiating committee of the multiemployer group. At that meeting the two groups exchanged proposals. The negotiating committee for the multiunion group transmitted its proposals to the multiemployer group not only with respect to the national contract but also for the Joint Council No. 7 Supplemental Agreement.

Thereafter, negotiating meetings were held with respect to the national agreement at various times between February 2 and sometime in April 1970. Negotiating meetings were held with respect to the Joint Council No. 7 Supplemental Agreement between February 17 and March 13 in

which certain items were unresolved. These unresolved items were subsequently resolved on April 1 or 2 by the national bargaining committees. On April 29, the Teamsters negotiating committee met and approved the national agreement and the various area supplemental agreements including the Joint Council No. 7 Supplemental Agreement. On April 30, the national and supplemental agreements were approved by two representatives from each of the Teamsters locals in the multiunion group. Thereafter, a nationwide referendum vote of all Teamsters members was conducted by the Department of Labor and it determined thereby that the employees had ratified the agreements. In July 1970, the principal negotiators for the multiunion and multiemployer groups modified their agreement to provide for an additional wage benefit which resulted from a strike by a Chicago local.

Although it appeared during the course of the hearing that Respondent contested the allegation in the complaint that a new National Master Freight Agreement and Joint Council No. 7 Supplemental Agreement for the period April 1, 1970, to June 30, 1973, were entered into by the multiunion-multiemployer bargaining groups, no reference to this contention was made in Respondent's brief. In any event, it is concluded that said agreements were arrived at as above stated.

Respondent's Contentions

It appears from the record and from Respondent's brief that Respondent contends that the Charging Parties' employees are not covered by the aforesaid 1970-1973 agreements on two bases. The first basis for this contention (advanced by Respondent in its brief) is that the Charging Parties were not bound by the negotiations for the 1970-1973 agreements, since the bargaining history between the Respondent and the Charging Parties discloses that prior agreements were negotiated on an individual basis. As set forth hereinabove, there is no merit to this contention since it has been found that each of the Charging Parties had

entered into agreements with Respondent, as provided in the 1964-1967 and 1967-1970 contracts, that their bargaining be conducted by the multiunion-multiemployer groups.

The second basis for Respondent's contention is that, even if it were to be assumed that Local 70 and the Charging Parties were part of the multiunion-multiemployer bargaining unit, Respondent made a timely withdrawal from said unit. Respondent relies on its letter of January 28, 1970, to the various Charging Parties as constituting its timely withdrawal and argues that negotiations did not commence until February 3, 1970.

Respondent's aforesaid letter of January 28, 1970, stated as follows:

> By letter of December 19, 1969, you were notified that the National Over the Road, City Cartage, Freight Garage, and Freight Office Policy and Negotiating Committee, the Western Conference of Teamsters, and the undersigned Local Union, desired to negotiate changes or revisions in the National Master Freight Agreement and in all area, regional and local supplements, addenda, appendicies or Riders thereto, for the contract period commencing April 1, 1970.
>
> It is our undersatnding that you will not be represented in such negotiations by any Employer Association. Furthermore, the nature of your industry is such that it is not meaningful to conduct negotiations with you at the same bargaining sessions involving the National Master Freight Agreement and the Local Supplement thereto. For these reasons we intend to negotiate a separate agreement from the National Master Freight Agreement and Local Supplement with your industry.
>
> Therefore, you are hereby notified that the undersigned Local Union, as bargaining agents for the involved employees, desire to negotiate changes or revisions in the National Master Freight Agreement and

in all Area, Regional and Local Supplements, Addenda, Appendicies or Riders thereto for the contract period commencing April 1, 1970, as provided in Article 37 thereof. You are further notified that this notice applies to any separate agreement we may have covering freight, garage or freign office employees.

Would you kindly respond to this letter within two weeks with our office, so that a time and place of negotions can be agreed upon. It is hoped that a food industry agreement may be arrived at through negotiations at which all local food companies will be represented.

It appears that the Respondent by the aforesaid letter attempted to detach the Charging Parties from the multiemployer group as that it could conduct negotiations directly with the Charging Parties and other members of the "food industry" and set up a multiemployer bargaining unit of employers in said industry.

It is well established that an employer or a union may not withdraw from a multiemployer bargaining relationship after negotiations for a new contract are commenced, absent unusual circumstances, except by mutual consent.[8] It does not appear that unusual circumstances existed in the instant case in view of the fact that there is no showing that the circumstances differed in 1970 from the circumstances which existed when the Charging Parties agreed to be bound by the 1964-1967 and 1967-1970 National Master Freight Agreements and Joint Council No. 7 Supplements thereto. The record will not support a finding that the Charging Parties consented to the abandonment by the Respondent and Charging Parties of the multiunion-multiemployer bargaining unit. On the contrary, three of the

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[8] *Retail Associates, Inc.*, 120 NLRB 388, 395; *The Evening News Association, Owner and Publisher of "The Detroit News,"* 154 NLRB 1494, 1501; *Sheridan Creations, Inc.*, 148 NLRB 1503, 1505; *John J. Corbett Press, Inc.*, 163 NLRB 154, 157; *Bill O'Grady Carpet Service, Inc.*, 185 NLRB No. 41.

Charging Parties, Granny Goose, Nabisco and Sunshine, sent letters to Respondent in reply clearly indicating that they did not consent to the abandonment of the bargaining unit and there is no credible evidence that the other two Charging Parties indicated their willingness to withdraw from the bargaining unit. Consequently, the only remaining issue to be considered is whether the January 28 letter was a timely notice, i.e., prior to commencement of negotiations.

As stated hereinabove, the negotiators for the multiemployer and multiunion groups met on January 7, 1970, and exchanged proposals for the 1970-1973 national agreement and supplements thereto (including the Joint Council No. 7 Supplement). It is the opinion of the Trial Examiner that negotiations commenced at that point and, therefore, it is found that the January 28 notice was not timely.[9] Consequently, it is concluded that Respondent and Charging Parties remained members of the multiunion-multiemployer bargaining unit and were bound by the agreements arrived at in its negotiations.

The Picketing by Respondent

The record clearly demonstrates that Respondent engaged in picketing at the premises of each of the Charging Parties on various dates in 1970. Although Respondent denied the allegation in the complaint that such picketing occurred and that it was for the purpose of forcing or requiring the Charging Parties to bargain on an individual basis, Respondent offered no testimony in support of its said denial (either to the effect that the picketing did not occur or that it was not for the purpose stated).

[9] In view of this finding, no purpose would be served in considering the issue of whether or not, had the notice been timely, it would have been effective to accomplish the partial withdrawal of Respondent from the multiunion group *vis-a-vis* the Charging Parties and thereby detach the Charging Parties from the bargaining unit.

The pickets carried signs reading: "Teamsters Local 70 on strike" and the name of the company being picketed. The picketing occurred at the premises of Granny Goose and Sunshine, May 14 through May 21, 1970, and at Standard and Nabisco from November 30 to December 3, 1970, and at Lady's Choice from December 1 to December 3, 1970.

Subsequent to Respondent's above-quoted letter of January 28, 1970, Respondent, commencing on April 9, 1970, sent a number of communications to each of the Charging Parties seeking negotiating meetings with them. None of the Charging Parties complied with the Respondent's request for such negotiations. The last of said requests was transmitted on November 9, 1970, to which counsel for the Charging Parties responded on that date by declining on their behalf, stating that they were covered by a collective-bargaining agreement to which Respondent was a party. Counsel for Respondent responded to said letter, by a letter dated November 13, 1970, stating, *inter alia*, "I am hopeful you will advise your client to enter into negotiations. If not, Local 70 feels that it has every right to press its position."

It is apparent that, commencing on January 28, 1970, and continuing to the date of the hearing, the Respondent took the position, and repeatedly notified Charging Parties, that it and the Charging Parties were not bound by the multi-union-multiemployer negotiations and that the Charging Parties should enter into a separate contract with it. It is concluded that Respondent engaged in the above-mentioned picketing to force the Charging Parties to accept its position. There is nothing in the record which would tend to support a finding of any other purpose. Respondent did not introduce any testimony intended to show that the picketing was for some purpose other than that of forcing the Charging Parties to abandon their position that they and the Respondent were bound by the multiunion-multi-

employer bargaining negotiations and the ensuing agreements.[10]

By its aforesaid picketing to force the Charging Parties to accept its said position, Respondent violated Section 8(b)(1)(B) and 8(b)(3) of the Act, and by refusing to abide by the National Master Freight Agreement and the Joint Council No. 7 Supplement thereto for the period April 1, 1970, to June 30, 1973, violated Section 8(b)(3) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The unfair labor practices of the Respondent set forth in section III, above, occurring in connection with the activities of the Charging Parties described in section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The Remedy

It having been found that the Respondent has violated Section 8(b)(1)(B) and 8(b)(3) of the Act, it will be recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in this proceeding, I make the following:

Conclusions of Law

1. All drivers, hostlers, lift jitney operators, forklift operators, platform men, new furniture helpers and helpers employed by members of the above-mentioned employer

[10] Respondent's brief is silent with respect to the allegation of the picketing and its purpose.

group, including the Charging Parties herein, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

2. Respondent and the Charging Parties are, and at all times material herein were, members of the above-mentioned multiunion-multiemployer bargaining unit and were, with respect to employees of the Charging Parties whom Respondent represents, bound by the negotiations in said unit which resulted in the National Master Freight Agreement and the Joint Council No. 7 Supplemental Agreement for the contract period April 1, 1970, to June 30, 1973.

3. By refusing to be bound by said national agreement and supplement thereto with respect to the aforesaid employees of the Charging Parties, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(3) of the Act.

4. By picketing the Charging Parties for the purpose of detaching them from the multiemployer bargaining group and forcing them to bargain separately with it, the Respondent has restrained and coerced, and is restraining and coercing, the Charging Parties in the selection of their representatives for the purposes of collective bargaining or adjustment of grievances in violation of Section 8(b)(1)(B) of the Act and has refused to bargain collectively with them within the meaning of Section 8(b)(3) of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[11]

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[11] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondent, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Refusing to give full force and effect to the National Master Freight Agreement and the Joint Council No. 7 Supplement thereto for the contract term April 1, 1970, to June 30, 1973, with respect to employees of the Charging Parties in the following classifications: All drivers, hostlers, lift jitney operators, folklift operators, platform men, new furniture helpers and helpers.

(b) Seeking separate bargaining agreements from the Charging Parties for their employees covered under the aforesaid National Master Freight Agreement and Joint Council No. 7 Supplement thereto.

(c) Restraining and coercing the Charging Parties herein in the selection of their representatives for the purposes of collective bargaining or the adjustment of grievances by picketing or any other means.

2. Take the following affirmative action which is designed to effectuate the policies of the Act:

(a) Notify in writing each of the Charging Parties that it will adhere to and be bound by the terms of the National Master Freight Agreement and the Joint Council No. 7 Supplement thereto for the contract term April 1, 1970, to June 30, 1973, and sign said agreements upon request.

(b) Post at its union offices in Oakland, California, copies of the attached notice marked "Appendix."[12]

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[12] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Copies of said notice, to be furnished by the Regional Director for Region 20, after being duly signed by a representative of the Respondent, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Deliver to the Regional Director for Region 20 signed copies of said notice in sufficient numbers to be posted by each of the Charging Parties at their places of business, if said Employers are willing.

(d) Notify said Regional Director, in writing, within 20 days from the date of the receipt of this Decision, what steps Respondent has taken to comply herewith.[13]

Dated: September 13, 1971

/s/ STANLEY GILBERT
Stanley Gilbert
Trial Examiner

APPENDIX

NOTICE TO MEMBERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT refuse to give full force and effect to the National Master Freight Agreement and the Joint Council No. 7 Supplement thereto for the contract term April 1, 1970, to June 30, 1973, with respect to employees of GRANNY GOOSE FOODS; LADY'S CHOICE FOODS, DIVISION OF EARLY CALI-

[13] In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

FORNIA FOODS, INC.; NATIONAL BISCUIT COMPANY; STANDARD BRANDS, INC.; and SUNSHINE BISCUIT COMPANY in the following classifications: All drivers, hostlers, lift jitney operators, forklift operators, platform men, new furniture helpers and helpers.

WE WILL NOT seek separate bargaining agreements from the above-named Employers for their said employees who are covered under the aforesaid National Master Freight Agreement and Joint Council No. 7 Supplement thereto.

WE WILL NOT restrain and coerce the above-named Employers in the selection of their representatives for the purposes of collective bargaining or the adjustment of grievances by picketing or by any other means.

WE WILL notify in writing each of the above-named Employers that we will adhere to and be bound by the terms of the National Master Freight Agreement and the Joint Council No. 7 Supplement thereto for the contract term April 1, 1970, to June 30, 1973, and sign said agreements upon request.

BROTHERHOOD OF TEAMSTERS AND AUTO TRUCK DRIVERS LOCAL No. 70, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, 13050 Federal Building, 450 Golden Gate Avenue, Box 36047, San Francisco, California, 94102. Telephone Number: 556-3197.